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In the

Supreme Court of the United States

October Term, 1983

MOBIL OIL CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION and MARATHON PETROLEUM COMPANY,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and DONALD P. HODEL, SECRETARY OF ENERGY

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

(Attorneys' Names appear on inside cover)

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QUESTIONS PRESENTED

This case involves a rule which required petroleum refiners to pretend that certain costs incurred in refining had been recovered in their prices even though, in fact, they had not. Based on those fictitious recoveries, the rule exposed refiners to potential liabilities for overcharges that may reach several billion dollars. Notwithstanding its significance, the rule was adopted without advance notice or an opportunity for public comment.

Three district courts held that the agency's failure to follow statutory rulemaking procedures was inexcusable and invalidated the rule. The Temporary Emergency Court of Appeals ("TECA") disagreed, holding that the agency's speculation regarding the potential consequences of giving notice of the rule supplied sufficient good cause to dispense with such notice. TECA also held that, in any event, the rule had been validly repromulgated in a later proceeding which proposed modifications to the rule. The questions presented are:

1) Whether the Administrative Procedure Act and the more stringent Federal Energy Administration Act permit an agency to dispense with public rulemaking procedures based solely on its "predictive judgment" that notice of a proposed rule might lead to conduct contrary to the rule during the comment period?

2) Whether an agency's "predictive judgment" on the possible effects of prior notice is entitled to "special deference" which effectively insulates that judgment from judicial review?

3) Whether an agency can find "good cause" to dispense with public rulemaking procedures when the public's right to participate can be readily accommodated with all valid concerns of the agency?

4) Whether an agency can validly promulgate a rule by permitting interested parties to urge its repeal in a later proceeding?

5) Whether the statement of basis and purpose required by the Administrative Procedure Act may be "non-existent" and need not mention the rule, any supporting grounds or any comments received?

PARTIES TO THE PROCEEDING

The caption of this Petition contains the names of all parties in this case in the court of appeals.[1] The court of appeals consolidated oral argument of this case with *Naph-Sol Refining Co. v. Murphy Oil Corp.*, 550 F. Supp. 297 (W.D. Mich. 1982), and issued a single opinion in both cases. The accompanying note lists persons who filed briefs *amici curiae* in the court of appeals.[2]

1. Pursuant to this Court's Rule 28.1, a listing of each petitioner's non-wholly-owned subsidiaries or affiliates is set forth in the Appendix to this Petition ("Pet. App.") at A-119-140.

2. Krank J. Kelley, Attorney General, State of Michigan; Charles E. Graddick, Attorney General, State of Alabama; Tyrone C. Fahner, Attorney General, State of Illinois; LeRoy S. Zimmerman, Attorney General, Commonwealth of Pennsylvania; Kenneth Cory, Controller, State of California; Go-Tane Service Stations, Inc.; Kickapoo Oil Company, Inc.; Lake Shore Oil Company; Growmark, Inc.; Richard W. Dyke, dba Western Stations Co.; Colvin Oil Company and F.O. Fletcher, Inc., dba Fletcher Oil Company.

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MOBIL OIL CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION AND MARATHON PETROLEUM COMPANY,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY AND DONALD P. HODEL, SECRETARY OF ENERGY,

Respondents.

Petitioners Mobil Oil Corporation, Exxon Corporation, Gulf Oil Corporation and Marathon Petroleum Company (hereinafter collectively referred to as "petitioners") respectfully pray that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals ("TECA") entered in this action on December 20, 1983.

OPINIONS BELOW

TECA's opinion, Nos. 2-40, 6-31, is not yet reported but is reproduced at Pet. App. A-1-45. The opinion of the United States District Court for the Northern District of New York (Munson, Ch. J.) is reported at 547 F. Supp. 1246 (N.D.N.Y. 1982) and is reproduced at Pet. App. A-46-91. The decision of the United States District Court for the Western District of Michigan in the companion case of *Naph-Sol Refining Co.* v. *Murphy Oil Corp.* is reported at 550 F. Supp. 297, 315 (W.D. Mich. 1982) and is reproduced at Pet. App. A-92-113.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1983 (Pet. App. A-ll4) and a timely petition for rehearing was denied on February 10, 1984 (Pet. App. A-ll5). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 *note*, as incorporated in § 5(a)(1) of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 754(a)(1).

STATUTES INVOLVED

Pertinent portions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, and the Federal Energy Administration Act ("FEAA"), 15 U.S.C. § 766(i)(1), are set forth in the Appendix at Pet. App. A-ll6-ll7.

STATEMENT OF THE CASE

Petitioners brought this action seeking declaratory and injunctive relief[3] respecting certain provisions of the Mandatory Petroleum Price Regulations, former 10 C.F.R. Part 212, which governed the prices refiners could charge for motor gasoline from 1973 until 1981.[4] The complaint challenged the validity of two price control rules. The first, known as the "three cent" retail price equalization rule, is not the subject of this petition. The second, known as the "equal application/deemed recovery" rule or "deemed recovery" rule, is explained below.

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3. The district court's jurisdiction was invoked under Section 5(a)(1) of the EPAA, 15 U.S.C. § 754(a)(1); Section 211 of the ESA, 12 U.S.C. § 1904, note; section 523(b) of the Energy Policy and Conservation Act, 42 U.S.C. § 6393(b); Section 502(b) of the Department of Energy Organization Act, 42 U.S.C. § 7192(b); the Administrative Procedure Act, 5 U.S.C. § 702; and under 28 U.S.C. §§ 1331, 1337, 1361, 2201 and 2202.

4. These regulations were rescinded by President Reagan on January 30, 1981, Executive Order No. 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981).

Regulatory Background

The basic feature of the price regulations was a maximum price which refiners could not lawfully exceed. With exceptions not relevant here, the maximum price was the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus certain increased costs incurred since then. 10 C.F.R. § 212.82(f)(1)(i).[5] If refiners did not charge the maximum price, they could hold available or "bank" unrecovered increased costs for use in future months. 10 C.F.R. § 212.83(e)(1).

The Equal Application/Deemed Recovery Rule

On September 5, 1974, the Federal Energy Administration ("FEA") amended the "bank" rule without providing notice or an opportunity for public commentary. 39 Fed. Reg. 32307 (September 5, 1974). The amendment (the "equal application/deemed recovery" rule) was intended to discourage, but not prevent, refiners from passing through unequal amounts of costs to their different classes of purchaser of a product. Under the rule, the one at issue here, a refiner was required to compute its cost recoveries as though the largest increment of costs recovered in any individual sale had been recovered in all sales of the product involved.[6] 10 C.F.R. § 212.83(d), 39 Fed. Reg. 32309 (1974). Thus, if a refiner unequally applied its costs among classes, it was "deemed" to have recovered the difference. An exception provided that refiners were not subject to this deemed recovery penalty where the unequal application of costs resulted from the price term of a written contract entered into on or before September 1, 1974.[7]

The rule was designed to encourage the maintenance of historic price differentials among classes by discouraging refiners from offering lower prices to selected customers in response to market

5. Citations are to the regulations as repromulgated at 39 Fed. Reg. 1951, *et seq.* (1974).
6. The full text of the rule is set forth at Pet. App. A-117-118.
7. *Id.*

conditions. As applied by the agency, however, the rule can have a staggering effect when refiners charged prices lower than the lawful maximum.

Assume, for example, that a refiner either inadvertently misclassified a customer or incorrectly computed the May 15, 1973 price for his class, resulting in a per gallon price 5¢ higher than the correctly determined price, but still less than the maximum. Under the equal application rule as applied by the agency, the refiner would be required to pretend that the 5¢ had been recovered on every gallon sold, even if the particular customer bought only ten gallons per month. Thus, if the refiner sold 10 million gallons of product per month, its regulatory penalty for this single error would be some $37 million for the 74-month lifetime of the rule. If it sold 100 million gallons a month, the penalty for its 5¢ regulatory transgression would be $370 million.

This potential impact is not hypothetical. The agency represented to the court of appeals that its current enforcement proceedings allege in excess of one billion dollars in overcharges based on these fictitious cost recoveries.[8] Private suits involve untold millions more.

Notwithstanding the rule's significant effects, the agency waived notice and comment procedures, asserting that an "emergency" existed. 39 Fed. Reg. at 32307. Acknowledging that "sellers were not specifically required actually to charge the prices arrived at under the regulations," *id.*, the agency concluded that the regulations should be changed to reflect that "prices actually charged, and not merely prices calculated as lawful maximums must reflect the equal application of increased costs." *Id.* The claimed emergency was that "announcement of [the] amendments would highlight current ambiguities in the Regulations and could result in sellers seeking to take advantage of the ambiguity or of the contract exception to the Rule." *Id.*

8. *See* Brief of Defendants-Appellants at 22, dated December 21, 1982.

The September 10, 1974 Rulemaking

Five days after adopting the rule, the agency proposed a number of significant changes in the regulations, including "modifications in the equal application of increased product costs requirements."39 Fed. Reg. 32717 (Sept. 10, 1974). The agency noted that the newly promulgated rule was "responsible for an inflexibility in the price regulations which becomes more troublesome and causes more dislocations in the market as supplies of petroleum products increase" and that, in certain instances, the rule "runs counter to the interests of independent regional marketers."*Id.*

The agency also concluded that the rule resulted "in selling prices that are too high to be competitive in some markets and are too low in other markets" and that the rule "creates an inflexibility that can have results that appear to be at odds with the objectives of the EPAA."*Id.* It therefore decided that "the equal application requirement should be modified" but added:

> To the extent that the current requirement serves to protect the independent sector of the market, FEA has concluded that it must be retained.

Id.

The December 5, 1974 Rulemaking

On December 5, 1974, the agency adopted several of the changes it had proposed on September 10, 1974 and, in publishing the regulations as amended, republished the deemed recovery rule. 39 Fed. Reg. 42368 (Dec. 5, 1974). The regulatory preamble made no mention of the rule or any comments received in response to the agency's September 10 proposal to amend the rule. The preamble simply stated that "those possible revisions which have not been acted on continue to be under active consideration."*Id.*

Although the agency republished the rule on December 5, it stated nineteen days later that it had "not yet completed its analysis of [the September 10] proposal" to modify the rule. 39 Fed. Reg. 44407 (Dec. 24, 1974).

The Decision of the District Court

On cross-motions for summary judgment, the district court found the equal application rule procedurally invalid. 547 F. Supp. 1246, Pet. App. A-46-91. The court noted that, although the APA's "good cause" exception is to be "narrowly construed," its use could be "justified by obvious and compelling facts."Pet. App. A-87. The court also noted that the FEAA's more stringent exception was to be invoked "very sparingly."*Id.* Concluding that waiver would be proper only if an "exigency" was presented, not just a claim "that an agency action [is] in furtherance of regulatory objectives. . . ,"*id.* at A- 88, the court held that "[h]ere, there [were] no compelling circumstances" warranting waiver of statutory rulemaking procedures. *Id.*

The district court also rejected the agency's alternative argument that the rule had been validly repromulgated when it was republished on December 5, 1974. As the court found, the September 10 notice "concerned only *modifications* of [the equal application] requirement, and specifically advised interested persons that the agency was not contemplating the elimination of the requirement." *Id.* at A-89 (emphasis in the original).

Nine days after the district court's decision, another court independently came to the same conclusion. *Naph-Sol Refining Co. v. Murphy Oil Corp.*, 550 F. Supp. 297 (W.D. Mich. 1982),[9] Pet. App. A-92-113. That court found that the agency lacked "good cause" for waiving rulemaking requirements and rejected the agency's repromulgation argument because the December 5 preamble did not contain the statement of basis and purpose required by 5 U.S.C. § 553(c). Pet. App. A-109-110.

The Decision of the Court of Appeals

On appeal, TECA reversed both *Naph-Sol* and the district court's decision. TECA concluded that the agency's disregard of

9. The deemed recovery rule had earlier been invalidated in Lakes Gas Co. v. DOE, 477 F. Supp. 187 (D. Minn. 1979). Thus, three district courts have held the rule to be procedurally invalid.

public rulemaking procedures was justified because "announcement of the deemed recovery rule could have generated selective pricing and 'grandfathering' of unequal prices in favor of refiner-operated stations."Pet. App. A-31-32. The court of appeals found that the agency's "predictive judgment" in this regard was entitled to "special deference," *id.* at A-31, and declined to "second-guess" the agency's guess. *Id.* at A-32.

TECA further held that, in any event, the rule was validly promulgated when it was republished on December 5. In the court's view, the September 10 proposal, which it cited as the agency's finding of good cause to adopt the rule without notice, was also a proposal to abolish the rule. Pet. App. A-35-36. The court found that the rule had been validly promulgated because refiners had been given an opportunity "to urge its repeal."*Id.* at A-37.

Finally, the December 5 notice, allegedly readopting the rule, was found to contain an adequate statement of basis and purpose even though it did not mention the rule, discuss comments received or specify reasons for the rule's adoption. *Id.* at A-38-39. The court stated that even a "non-existent" statement could satisfy the APA's statement of basis and purpose requirement. *Id.* at A-38. Although TECA found that the rule had been repromulgated on December 5, the agency stated nineteen days later that it had not yet completed its analysis of the September 10 proposal to modify the rule.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision departs from settled principles of administrative law, conflicts with decisions of other courts of appeals, and threatens to upset the balance struck by Congress in enacting the APA and FEAA. The decision presents questions of exceptional importance since, as this Court has emphasized, Congressionally established rulemaking requirements represent "a formula upon which opposing social and political forces have come to rest."*Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523 (1978). If left undisturbed, the decision will

stand as an open invitation for agencies to ignore rulemaking procedures designed to ensure open and informed governmental decisionmaking. TECA accepted, without question, the agency's "good cause" determination, declining to "second-guess" the agency's "predictive judgment" that notice and opportunity to comment could have had adverse consequences. Pet. App. A-31-32. Its blind deference to the agency's invocation of its predictive powers clashes directly with this Court's recent teaching in *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856 (1983), as well as the decision in *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983). Moreover, TECA's approach gives an agency license to bypass proper rulemaking procedures, secure in the knowledge that a court will not review its "prediction" that notice and comment could lead to conduct it disfavors. Judicial creation of such an all-purpose escape clause warrants this Court's plenary review.

The court of appeals also endorsed the propositions that (1) a rule may be properly promulgated without advance notice and opportunity for comment if the agency later permits regulated parties to "urge its repeal" and (2) a rule may be upheld even when the basis and purpose statement is "non-existent." Pet. App. A-37-38. The first proposition is at odds with decisions of other courts of appeals and warrants this Court's review to ensure uniformity among the circuits. The second is an unprecedented negation of an essential element of valid rulemaking.

Review by this Court is necessary to "ensure that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979). Where, as here, the agency's action has enormous financial consequences, review is especially appropriate since "with the consideration that is the necessary and intended consequence of such procedures, [the agency] might have decided that a different accommodation was more appropriate." *Id.* at 303, 316.

I.

THE DECISION BELOW PRESENTS IMPORTANT QUESTIONS REGARDING APPLICATION OF THE APA AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL

A. By According the Agency's "Good Cause" Determination Total Deference, TECA Excused the Agency from Applicable Rulemaking Procedures on Grounds That Were Legally Inadequate and the Product of Irrational Speculation

The agency bypassed notice and comment procedures in this case because it feared that (1) "highlighting the gap in the Regulations through advance notice would promote discriminatory pricing" and (2) "refiners would seek to take advantage of the 'contract exception' to the deemed recovery rule and 'grandfather in' unequal cost pass-throughs to refiner operated stations by entering into long-term contracts." Pet. App. A-28. In approving that action, TECA held that "good cause" justified the immediate adoption of the deemed recovery rule—not because of the need to deal with an existing emergency but because a notice of proposed rulemaking purportedly could have induced companies to engage in pricing activities that the agency sought to discourage through the rule.

TECA acknowledged the danger inherent in its approach. It noted "that agencies might frequently assert that someone will take advantage of the situation if advance notice is given" and that, so applied, the good cause exception could "become an all purpose escape-clause" to proper rulemaking procedures. Pet. App. A-29. Nevertheless, it refused to "second-guess" the agency's good cause determination because it involved "[j]udgments of a predictive nature" that were entitled to "special deference." Pet. App. A-30-31. TECA thus "treat[ed] the predictive nature of the judgment 'as though it were a talisman under which any agency decision is by definition unimpeachable.'" *International Ladies' Garment Workers' Union v. Donovan*, *supra*, 722 F.2d at 821, *quoting Motor Vehicle Manufacturers'*

Ass'n v. State Farm Mutual Automobile Insurance Co., supra, 103 S. Ct. at 2870. Under TECA's decision, an agency may hide behind its "predictive judgment," exempt from effective judicial review.

TECA's total deference to the agency's unsupported "predictive judgment" conflicts with this Court's recent decision in *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Automobile Insurance Co., supra.* In *State Farm* this Court recognized that "it is not infrequent that the available data do not settle a regulatory issue" but found that such circumstances do not permit an agency merely to recite its conclusions. 103 S. Ct. at 2871. Instead, the "agency must explain the evidence which is available and must offer a 'rational connection between the facts found and the choice made.'" *Id. See also id.* at 2869. Here, the agency offered no more than its own *ipse dixit* that refiners might take advantage of prior notice. In the absence of any support or evidence, TECA should have followed this Court's holding and ruled that the agency failed to offer any rational support for its conclusion.

TECA's "special deference" to the agency's prediction also squarely conflicts with the recent decision in *International Ladies' Garment Workers' Union v. Donovan, supra.* Based on this Court's decision in *State Farm*, the District of Columbia Circuit there rejected the argument that courts are obliged to defer blindly to an agency's alleged superior ability to make predictions. 722 F.2d at 821-22. The *Donovan* court recognized that unrestrained deference would "effectively nullif[y]" judicial review and transform agency expertise into a "monster which rules with no practical limits on its discretion." *Id.* at 822 (citations omitted). TECA's departure from this Court's decision in *State Farm* and the resulting conflict with the decision in *Donovan* merit review by this Court.

1. *TECA Improperly Expanded the Good Cause Exception*

The decision below permits an agency (1) to determine, without public input, that a rule is in the public interest, (2) to determine that noncompliance with the new rule during a short comment period would itself create an emergency justifying failure to give notice, and (3) to insulate its actions from judicial review by failing to create an administrative record and by relying on its own "predictive judgment" as to the future. The APA and more stringent FEAA,[10] however, reflect Congress' judgment that notice is in the public interest. Congress directed the agency to consider public commentary *before* concluding that the public interest supports promulgation of a rule. By accepting the agency's determination that a rule is desirable and that noncompliance during a notice period should not be permitted, TECA so expanded the good cause exception that it may be applicable in virtually every rulemaking situation.

This Court has never had occasion to examine the standards governing an agency's waiver of public rulemaking under the APA's good cause exception, 5 U.S.C. § 553(b)(B). In most cases, the inquiry is uniquely factual, requiring a determination that an "emergency situation" exists. *E.g.*, *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 488 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983), *quoting American Federation of Government Employees v. Block*, 655 F.2d 1153, 1156

10. The courts should be particularly vigilant to guard against agency circumvention of rulemaking requirements where, as here, Congress chose to impose rulemaking "requirements [that were] 'more rigorous than those provided for in the APA.'" *Standard Oil Co. v. DOE*, 596 F.2d 1029, 1058 (TECA 1978), *quoting Phillips Petroleum Co. v. DOE*, 449 F. Supp. 760, 799-800 (D. Del. 1978). The Federal Energy Administration Act "provide[d] only the narrowest exemption from its publication, notice, and comment requirements." *Standard Oil Co. v. FEA*, 453 F. Supp. 203, 243-44 (N.D. Ohio 1978), *aff'd sub nom. Standard Oil Co. v. DOE*, *supra*. It authorizes waiver of notice and comment only where strict compliance with proper procedures would have caused serious harm or injury to the public health, safety or welfare. 15 U.S.C. §766(i)(1)(B). Congress intended that this waiver provision "be used very sparingly." S. Rep. No. 788, 93d Cong., 2d Sess. 27, *reprinted in* [1974] U.S. Code Cong. & Ad. News 2972, 2977.

(D.C. Cir. 1981). In this case, however, TECA did not find that an emergency existed. Its decision deals instead with a generic situation common to all administrative agency practice.

Whenever an agency gives notice of a proposed rule, it can safely predict that regulated parties might seek to avoid the rule during the rulemaking process. Such actions will always be contrary to the agency's tentative conclusions regarding the public interest. Congress believed, however, that this cost of rulemaking was outweighed by the salutary benefits of permitting the public to educate the agency through the rulemaking process. Petitioners therefore submit that in circumstances such as these, an agency may dispense with notice and comment only upon a showing that the rule itself is necessary to protect an important public interest *and* when there is a significant threat that regulated parties are likely to avoid the proposed rule during the comment period. Here, of course, the deemed recovery rule was not necessary to protect the public interest since the agency proposed its amendment five days after it was published.

This Court's review is warranted to prevent the decision below from creating the "all purpose escape-clause" which TECA itself feared. If agencies are indeed to be permitted such an exception, it should only be upon the determination and under standards endorsed by this Court.

2. *TECA's Refusal to Scrutinize The Record Merits Review*

TECA itself has emphasized the court's "duty to scrutinize the record to ascertain whether in fact an exception [to the APA] did exist,"[11] noting: "[it] is axiomatic that [the agency's] mere recital of good cause does not create good cause."[12] By simply deferring to the agency's speculation in this case, TECA abdicated its duty and failed to inquire whether there was any basis for the agency's speculation. Such an inquiry would have revealed

11. Mobil Oil Corp. v. DOE, 610 F.2d 796, 804 (TECA 1979), *cert. denied*, 446 U.S. 937 (1980).
12. *Id.* at 803.

that the agency's fears were unfounded. The consequences cited by the agency—widespread discriminatory pricing and selective grandfathering of contracts—could not have occurred and the agency therefore had no good cause for dispensing with statutory notice.

(i) *Discriminatory Pricing*

Prior to announcement of the deemed recovery rule, the agency's regulations prohibited "any form of discrimination among purchasers" which had "the effect of frustrating or impairing the objectives [of the EPAA]." 10 C.F.R. § 210.62(b). Although that section did not prohibit all discriminatory pricing, it certainly reached the kind of egregious conduct which the agency feared. *McWhirter Distributing Co. v. Texaco, Inc.*, 668 F.2d 511 (TECA 1981). Therefore, notice of the deemed recovery rule could not have led to such conduct and the rule was not "necessary" to prevent it.

In any event, interim price discrimination during a ten day comment period[13] would not have jeopardized the public welfare. By the agency's own admission, the deemed recovery rule was promulgated during a period when supplies were on the rebound, market forces were returning, and competition was beginning to result in lower prices. As Chief Judge Devitt noted when invalidating the deemed recovery rule, those conditions do not amount to a crisis involving the "severe adverse economic consequences" necessary to justify waiver of notice and comment. *Lakes Gas Co. v. DOE*, *supra*, 477 F. Supp. at 192. The prospect of market forces influencing prices during a time of adequate supplies is hardly a "calamitous circumstance" which excuses the agency from its rulemaking obligations. *See Nader v. Sawhill*, 514 F.2d 1064, 1069 (TECA 1975). Indeed, the agency itself contemporaneously acknowledged that *not* allowing refiners to respond to changing market conditions was "counter to the interests of independent regional marketers" and therefore "troublesome." 39 Fed. Reg.

13. The FEAA required a comment period of only ten days. *See* 15 U.S.C. § 766(i)(1).

at 32723.[14] Apparently because of its deference to the agency, TECA never mentioned 10 C.F.R. § 210.62(b) and never inquired whether the agency's fears were well-founded.

(ii) *Contract Grandfathering*

The agency's reliance on a fear of "grandfathering" was equally specious. First, it presumes the existence and form of the "grandfather" clause contained in the rule itself. If the agency was truly concerned about such conduct, it would have proposed a rule which did not permit grandfathering. Second, the rule as adopted stated that refiners would not be penalized if unequal passthrough resulted from a contract entered into prior to September 1, 1974. "Grandfathering" after that date, or any other date chosen by the agency, would have been prevented even if the agency had given advance notice of the rule. Thus, there was absolutely no reason not to subject such a rule to public scrutiny. Once again TECA refused to examine these reasons why the agency's fears were unfounded.

3. ***TECA's Reliance On The September 10, 1974 Proposals Warrants this Court's Review***

TECA recognized that there was no record support for the agency's September 5 conclusion that "good cause" existed. TECA nevertheless decided that the agency had found good cause for its action in light of its statements on September 10, 1974. Pet. App. A-33. That conclusion merits review by this Court for two reasons.

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14. Even the agency seemed to recognize that "price discrimination" presented no serious threat to the public, since the rule did not, in fact, prohibit such discrimination. The agency later explained:

> If refiners did wish to institute discriminatory pricing, they could do so under the present regulations which allow unequal price increases provided cost recovery is computed as if the highest price increase had been charged to all customers.

45 Fed. Reg. 72626, 72629 (Nov. 3, 1980).

First, both the APA and the FEAA require the agency to set forth its justification for dispensing with rulemaking requirements in the rules adopted[15]—not in a subsequent proceeding. TECA's unexplained and open departure from those statutes merits examination by this Court.

Second, the agency did not contemporaneously suggest that the policies mentioned in its September 10 proposal presented good cause for adopting the rule without notice. Instead, those policies were cited as reasons for retaining certain aspects of the rule while deleting others. Whatever the merits of the rule, however, the agency was not free to dispense with rulemaking requirements simply because it believed parts of the rule itself were unreasonable. This Court has never permitted agency action to be upheld on the basis of such later rationalizations[16] and TECA's contrary holding merits review.

B. This Court Should Determine Whether Rulemaking Requirements May Be Waived When An Agency Can Fully Accommodate the Public's Right to Participate

Even if the agency had a basis for believing that refiners' actions in response to notice would have seriously impaired the regulatory program, it could have eliminated that problem without offending relevant rulemaking requirements. The agency could have published notice of a proposed rule, solicited comment, and provided in the notice that the rule, if adopted, would be effective as of the original proposal's publication. That simple procedure would have reconciled the agency's desire to prevent pricing abuses or exploitation of the contract exception during the pendency of a rulemaking with the public's statutory right to be heard.

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15. 5 U.S.C. § 553(b)(B) required the agency to incorporate its good cause finding "and a brief statement of the reasons therefor *in the rules issued*" (emphasis added). 15 U.S.C. § 766(i)(1)(B) required the agency to set forth its finding "*in detail in such rule*, regulation or order" (emphasis added).

16. *See, e.g.*, Investment Co. Institute v. Camp, 401 U.S. 617, 628 (1971).

TECA rejected that solution, even though it is squarely in the mainstream of administrative law. "If the admonition to construe the good cause exception of section 553(b)(B) narrowly means anything, it means that we cannot condone its invocation where, as here, such a reconciliation is possible." *New Jersey* v. *EPA*, 626 F.2d 1038, 1047 (D.C. Cir. 1980). A good cause finding is justified only when "execution of the agency's functions would be *unavoidably prevented* by its undertaking public rule-making proceedings." S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946) (emphasis added).

Neither TECA nor the agency denied that this procedure could have been used to comply with the APA and FEAA without any untoward effects.[17] Nevertheless, TECA rejected it for two reasons. First, it mistakenly believed that requiring the agency to follow the procedure would have amounted to the imposition of a new procedural requirement contrary to *Vermont Yankee Nuclear Power Co.* v. *NRDC*, *supra*. Pet. App. A-32-33n.21. The case law and legislative history, however, demonstrate that where such a reconciliation is possible, there is no good cause. Thus, the issue here is the agency's compliance with "statutory minima"—not additional procedures. *See Mobil Oil Corp.* v. *DOE*, 610 F.2d 796, 804 (TECA 1979), *cert. denied*, 446 U.S. 937 (1980).

Second, TECA was also under the misapprehension that requiring the agency to engage in a reconciliation would have "swallow[ed] the good cause exception [as] interpreted" in its decisions in *Nader* v. *Sawhill*, *supra*, and *DeRieux* v. *Five Smiths, Inc.*, 499 F.2d 1321 (TECA 1974), *cert. denied*, 419 U.S. 896 (1975). Pet. App. A-32-33n.21. But those cases required immediate agency action to deal with existing emergencies—to prevent the withholding of crude oil during a time of critical shortage (*Nader*) or massive price increases during a highly

17. The agency was familiar with this procedure. Slightly more than a month before issuance of the deemed recovery rule, TECA affirmed a rulemaking in which the agency used virtually the same procedure. *See* California v. Simon, 504 F.2d 430, 439 (TECA), *cert. denied*, 419 U.S. 1021 (1974).

inflationary period (*DeRieux*). There was no such emergency here. In addition, the reconciliation procedure was particularly well-suited to this case because it would have prevented the conduct the agency feared.

TECA's decision embraces an interpretation of the good cause exception which permits its invocation even though the public's right to participate in the rulemaking can be readily accommodated. That determination presents an important question of law never passed upon by this Court, departs from settled administrative law and ignores the contrary legislative intent that notice is required unless "unavoidably prevented." Such a far-reaching determination should not escape review by this Court.

II.

TECA's HOLDING THAT THE RULE WAS REPROMULGATED MERITS REVIEW

A. Contrary to Decisions in Other Circuits, the Court of Appeals Held that Post-Promulgation Procedures Can Satisfy Statutory Rulemaking Requirements

TECA held that the rule was validly repromulgated because, in response to the September 10 notice, refiners had an opportunity "to urge its repeal."Pet. App. A-37. That holding departs from the uniform rule that an agency may not satisfy statutory rulemaking requirements by providing a post-promulgation opportunity for comment. *See, e.g., National Tour Brokers Ass'n* v. *United States*, 591 F.2d 896, 901-02 (D.C. Cir. 1978); *Wagner Electric Corp.* v. *Volpe*, 466 F.2d 1013 (3d Cir. 1972). The APA "requires notice *before* rulemaking, not after" and the "right . . . to petition for the amendment or repeal of a rule . . . is neither a substitute for nor an alternative to compliance with the [APA's] notice requirements."*Id.* at 1020 (emphasis in original). As the Fifth Circuit has put it, "after the rule is issued, the petitioner must come hat-in- hand and run the risk that the decisionmaker is likely to resist change." *United States Steel Co.* v. *EPA*, 595 F.2d 207, 214-15, *clarified*, 598 F.2d 915 (5th Cir. 1979). *See South*

Carolina v. *Block*, 558 F. Supp. 1004, 1020-21 (D.S.C. 1983) (collecting cases).

TECA also erred in concluding that, on September 10, 1974, the agency evidenced its "willingness to reevaluate the deemed recovery rule." Pet. App. A-35. The agency only proposed to modify the rule, expressly stating that to the extent the rule protected the independent sector "it must be retained."39 Fed. Reg. 32723. Thus, the agency stated on the record that it would not consider full repeal of the rule, much less reconsider the propriety of issuing it in the first place.

TECA's contrary conclusion was based primarily upon a misunderstanding of the proposed "repeal" in the September 10 notice. *See* Pet. App. A-35-36. It is true that the September 10 proposal did not include the deemed recovery rule. Its absence, however, did not reflect a reconsideration of the rule's merits. Rather, the agency proposed to repeal *all* prospective cost banking. *See* 39 Fed. Reg. 32718, analyzed and summarized at 547 F. Supp. 1254-1258, Pet. App. A-60-67. That proposal, of course, would have made the deemed recovery rule superfluous because *all* costs would be deemed recovered and unavailable for future passthrough.

TECA found the September 10 notice adequate in part because some refiners responded to it by urging repeal of the rule. Pet. App. A-36-37. Refiners' comments, however, are irrelevant, since the proper question is whether the *agency* ever demonstrated that it approached repeal of the rule with an open mind. Far from evidencing good faith reconsideration, agency statements in the new rulemaking confirmed its decision that the basic rule "must be retained."

This Court has never examined whether, and, if so, under what circumstances, an agency may validly "repromulgate" a rule which was not subjected to the "fairness and mature consideration"[18] accomplished by APA rulemaking. The decision below holds that an opportunity to urge a rule's repeal in response to a proposal to amend the rule is sufficient. That view ignores the

18. Chrysler Corp. v. Brown, *supra*, 441 U.S. at 303.

inherent bureaucratic momentum in retaining a rule once adopted and conflicts with the APA's basic concept of pre-promulgation notice as well as the decisions of other lower courts. Since the issue often recurs, *see South Carolina v. Block*, *supra*, 558 F. Supp. at 1020-21, guidance from this Court is warranted.

B. TECA Improperly Deleted The Statement of Basis and Purpose Requirement From APA Rulemaking

The APA mandates that a statement of basis and purpose accompany the publication of new rules. 5 U.S.C. § 553(c). That statement is intended to (a) enable the public to determine the actual bases and objectives of newly promulgated rules and (b) facilitate meaningful judicial review by explaining the legal and factual underpinnings of agency action. *Action On Smoking and Health* v. *CAB*, 699 F.2d 1209, 1215-16, *supp. op.*, 713 F.2d 795 (D.C. Cir. 1983).

TECA's decision effectively rewrites the statute, deleting this requirement. Indeed, TECA concluded that such a statement may be "non-existent" and endorsed a "statement" which does not even mention the rule whose "basis and purpose" it purportedly sets forth. If allowed to stand, this radical misapplication of the statute would eliminate one of the specific requirements and major virtues[19] of APA rulemaking. This Court's review is particularly appropriate here since, as demonstrated below, TECA's begrudging view of the APA led it to plain error.

On December 5 the agency published a notice adopting regulatory provisions wholly unrelated to the deemed recovery rule. The notice went on to state:

> Action on all other revisions to the price regulations proposed in the September 10 notice is deferred until a later date. However, those possible revisions which have not yet

19. *See*, Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 396 (1974).

been acted on continue to be under active consideration by FEA for decision in this proceeding.

39 Fed. Reg. 42368 (December 5, 1974). According to TECA, the agency validly repromulgated the deemed recovery rule when it published that notice. That pronouncement, however, cannot possibly qualify as a statement of basis and purpose for the rule. TECA itself noted that it was "hardly a model statement of the reasons for the agency's decision to retain the deemed recovery rule."Pet. App. A-38. It does not mention the rule, any comments received supporting or opposing the rule or any reasons why the agency would have adopted the rule. In fact, the notice's boilerplate language is almost identical to that found inadequate by the District of Columbia Circuit in *Independent U.S. Tankers Owners Committee v. Lewis*, 690 F.2d 908, 919 (D.C. Cir. 1982).

TECA characterized this deficiency as "technical" since the September 10 preamble "canvassed in some detail the opposing policy considerations involved." Pet. App. A-39. But the agency's September 10 discussion occurred *before* the receipt of any public comment on the rule. A notice of rulemaking and discussion of tentative issues is no substitute for the basis and purpose statement that the APA requires *after* notice and public comment. As other courts have emphasized, a "basis and purpose statement is not intended to be an abstract explanation addressed to imaginary complaints. Rather, its purpose is . . . to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." *Rodway v. Department of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975). *Accord Action on Smoking and Health v. CAB*, 699 F.2d 1209, 1216-17, *supplemented at* 713 F.2d 795, 799-800 (D.C. Cir. 1983). Here, the agency's violation precluded it from fulfilling its obligation to engage in a dialogue with the public on this far-reaching and onerous rule.

The extreme hazard inherent in TECA's view of the APA is fully revealed in this case. Notwithstanding the absence of a basis

and purpose statement, TECA thought that it could "fairly discern the agency's aims." Pet. App. A-39. In fact, TECA incorrectly read those aims, as the agency itself confirmed soon after the December notice. Nineteen days after it allegedly "repromulgated" the rule, the agency expressly stated that it had not done so. According to its own statement, the agency had "not yet completed its analysis of this [September 10] proposal," relating to the deemed recovery rule. 39 Fed. Reg. 44407 (Dec. 24, 1974). This statement, made weeks *after* TECA held the agency acted, refutes any suggestion that the agency "repromulgated" the equal application rule on December 5.

CONCLUSION

For the reasons set forth above, petitioners urge that a writ of certiorari issue to review the decision of the Temporary Emergency Court of Appeals.

Dated: March 12, 1984

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IN THE

Supreme Court of the United States

October Term, 1983

No. 83—

MOBIL OIL CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION and MARATHON PETROLEUM COMPANY,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and DONALD P. HODEL, SECRETARY OF ENERGY,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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Temporary Emergency Court of Appeals of the United States

No. 2-40

MOBIL OIL CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION, and MARATHON OIL CORPORATION, PLAINTIFFS-APPELLEES,

v.

THE DEPARTMENT OF ENERGY and JAMES B. EDWARDS, DEFENDANTS-APPELLANTS.

and

No. 6-31

NAPH-SOL REFINING COMPANY, PLAINTIFF-APPELLANT,

v.

MURPHY OIL CORPORATION, DEFENDANT-APPELLEE.

Appeals from the U.S. District Court for the Northern District of New York and the U.S. District Court for the Western District of Michigan

(No. 79-CV-11 and No. G79-14-CA6, respectively)

(Argued: April 15, 1983 Decided: December 20, 1983)

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Before METZNER, PECK and LACEY, Judges.
LACEY, Judge.

INTRODUCTION

The Department of Energy ("DOE") and Naph-Sol Refining Co. ("Naph-Sol") appeal from orders entered by, respectively, the District Court for the Northern District of New York and the District Court for the Western District of Michigan that, *inter alia*, invalidated the "deemed recovery rule" as procedurally defective. *Mobil Oil Corp. v. DOE*, 547 F. Supp. 1246 (N.D.N.Y. 1982),[1] is a declaratory judgment action brought to challenge the validity of a "three cent" retail price equalization rule and, alternatively, of the "deemed recovery rule." *Naph-Sol Refining Co. v. Murphy Oil Corp.*, 550 F. Supp. 297 (W.D. Mich. 1982), is an action for recovery of overcharges with respect to Naph-Sol's purchase of gasoline from Murphy Oil Corporation ("Murphy") at prices allegedly in excess of those permitted by the petroleum price regulations, 10 C.F.R. pt. 212, including the "deemed recovery rule," and by the supply contracts

[1] Plaintiffs in *Mobil v. DOE* are Mobil Oil Corporation, Gulf Oil Corporation, Exxon Corporation, and Marathon Petroleum Corporation. Unless otherwise indicated, a reference to Mobil encompasses all these parties.

existing between the parties. Although, as will become apparent, other issues are also before this court, the invalidation of the "deemed recovery rule" was pivotal to both district court rulings and resulted in the consolidation of these appeals.

I. *Background*

A. *Regulatory Background*

We first survey the various regulations involved, deferring until a subsequent section any detailed presentation of the procedural aspects of the rulemakings here in issue.

1. *Petroleum Price Regulations*

Prior to the rulemakings involved here, the Mandatory Petroleum Price Regulations,[2] 10 C.F.R. pt. 212, estab-

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[2] In November 1973, Congress passed the Emergency Petroleum Allocation Act ("EPAA"). Pub. L. No. 93-159, 87 Stat. 6280, 15 U.S.C. §§ 751 *et seq.* Pursuant to the statute, the President established the Federal Energy Office ("FEO") and delegated to it the authority to implement the allocation and price stabilization provisions of the EPAA. Exec. Order No. 11748, 38 Fed. Reg. 33575 (Dec. 6, 1973). The FEO adopted and republished without significant alternation the Cost of Living Council's Phase IV petroleum price regulations. 39 Fed. Reg. 744, 761 (Jan. 2, 1974); 39 Fed. Reg. 1924 (Jan. 15, 1974). These were the regulations in existence prior to the adoption of the rules involved in these cases.

On May 7, 1974, the Federal Energy Administration Act ("FEAA") was enacted. Pub. L. No. 93-275, 88 Stat. 97, 15 U.S.C. §§ 761 *et seq.* In June 1974, the President abolished the FEO and replaced it with the Federal Energy Administration ("FEA"). Exec. Order No. 11790, 39 Fed. Reg. 23185 (June 27, 1974). The FEA was a predecessor to the Department of Energy ("DOE"), which was established in 1977, pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 567, 42 U.S.C. §§ 7101 *et seq.* Federal control of the price and allocation of petroleum products was discontin-

lished limitations on the maximum prices refiners could charge in the sale of "covered products" or of "special products," such as motor gasoline.[3] Under the "price rule," a refiner could "not charge to any class of purchaser a price in excess of the base price" of the covered product except under certain specified conditions. 10 C.F.R. § 212.82 (1975). A "class of purchaser" was defined as "purchasers . . . to whom a person has charged a comparable price for comparable property or services pursuant to customary price differentials between those purchasers . . . and other purchasers. . . ." 10 C.F.R. § 212.31 (1975). One purpose of these price rules was to maintain the supplier-purchaser relationships as they existed in 1972-73, prior to the statutory regulation of the petroleum industry.

The "base price" was "the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs incurred between the month of measurement and the month of May 1973 . . . ." 10 C.F.R. § 212.82(f)(1)(i)(1975). To calculate its base price for a given month, therefore, a refiner had to: 1) establish its classes of purchaser; 2) compute its increased product costs and apportion these among the various products it sold; and 3) allocate the increased costs for each product among its classes of purchasers of that product.

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ued on January 28, 1981. Exec. Order 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981).

In text, regulations are cited to the first edition of C.F.R. in which they appear. Between 1973 and 1981 some of the regulations underwent amendments not relevant to the challenges in this case.

[3] "Special products," with which we are concerned, included no. 2 heating oil and 2-D diesel fuel as well as motor gasoline. 10 C.F.R. § 212.31 (1975).

The "refiner cost allocation formula" governed apportionment of increased product costs.[4] As it operated in January 1974, this formula yielded a cents per gallon figure, referred to as "d_i^u," that represented the maximum amount of increased product cost that a refiner might apportion to a given special product:

> d_i^u = the dollar increase that may be applied in the period "u" (the current month) to the May 15, 1973, selling price of the special product . . . to each class of purchaser to compute the base price to each class of purchaser . . . .

10 C.F.R. § 212.83(c)(2) (1975).

The d_i^u calculation established the maximum increment of increased product costs a refiner could pass through to each class of purchaser of a particular special product. Since d_i^u was a single number, the result of the formula was the equal application of increased product costs among classes of purchasers when the maximum was passed through. This rule was designed to distribute the burden of increased costs as uniformly as feasible.

The Regulations, however, did not require refiners actually to charge the base price. In certain market conditions, refiners might choose to set prices below base price by not immediately passing on some of the increased product costs. Whether, as of January 15, 1974, refiners were obligated to pass through increased product costs equally to each class of purchaser when selling prices were below base price is a matter in issue.

As noted, the Regulations did not require a refiner to recover all of its increased product costs for a given month in that month. The "cost bank rule," 10 C.F.R.

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[4] We consider the rules for "special products." The details of the rules for non-special products are not pertinent here.

A verbal formulation of the "refiner cost allocation formula" is set out in note 5 *infra*.

§ 212.83(e)(1) (1975), allowed the refiner to carry over, or "bank," its unrecovered increased product costs for inclusion in the calculation of base prices in a later month:

> (e) Carryover of costs. (1) If in any month . . . a firm charges prices for a special product which result in the recoupment of less total revenues than the entire amount of increased product costs calculated for that product pursuant to the general formula . . . the amount of increased products costs not recouped may be added to the May 15, 1973 selling prices to compute the base prices for that special product for a subsequent month.

Whenever a refiner added previously unrecouped costs to its current price, of course, it had to reduce its "bank" of these costs.[5]

In addition, the refiner could add to the base price certain increases in *non*-product costs incurred since May 1973 but only if the refiner satisfied certain profit margin limitations and complied with a prenotification procedure that required advance notice of the proposed price increase to the agency for its approval. 10 C.F.R.

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[5] This carried over unrecouped cost was part of the calculation in figuring the numerator in the formula for d_1^u. In verbal form, the d_1^u formula was as follows:

total cost of crude in period d_1^u = "u" × (total volume of gasoline sold in 3 month period including period "u" of previous year ÷ total volume of covered products sold in that period) + total increased costs of increased purchased gasoline in period "u" + banked increased costs attributable to gasoline = increased product costs allocable to gasoline that a refiner had allocated to other products

the volume of gasoline that the refiner estimates that it will sell in the current month "u"

See 10 C.F.R. § 212.83(c)(2)(i) (1975).

§ 212.87 (1975). The sum of the base price and allowable nonproduct cost increases was the refiner's maximum lawful price.

2. *April 1974 Three-Cent Rule* [6]

The "retail price equalization," or "three-cent," rule, promulgated in April 1974, was a response to an unintended price disparity that had developed between independent and refiner-operated gasoline stations. *See* 39 Fed. Reg. 13013, 13013-14 (April 2, 1974). In January and February 1974, the FEO authorized independent and refiner-operated retailers of motor gasoline to increase their retail selling prices by up to three cents a gallon to reflect increases in nonproduct costs incurred in the marketing of gasoline. *See* 39 Fed. Reg. 809 (Jan. 3, 1974); 39 Fed. Reg. 7795 (Feb. 28, 1974). Since refiner-operated stations were subject to profit margin and prenotification restrictions, however, they generally did not attempt to recover the three cent marketing cost allowance. As a result, independents were faced with either foregoing the three cent allowance or being undersold by the refiner-operated stations.

FEO responded by promulgating an amendment to the refiner cost allocation formula for calculating d_i^u:

> d_i^u = The dollar increase that may be applied in the period "u" (the current month) to the May 15, 1973 selling price of [a special product] to each class of purchaser to compute the base price to each class of purchaser, except that the dollar increase that may be applied in the period "u" to the May 15, 1973 selling price of gasoline to compute the base prices to the classes of purchaser which purchase gasoline at retail from a refiner at service stations operated by employees of the refiner may be "d_i^u" plus a maxi-

[6] This rule, the "old" three cent rule, and the May 1977 three cent rule, the "new" three cent rule, are relevant to *Mobil v. DOE*, but play no part in the *Naph-Sol v. Murphy Oil* appeal.

> mum of $.03 per gallon of gasoline provided that, in computing "d_i^u," the numerator of the [general formula] is reduced by an amount equal to the product of the actual amount of cents per gallon increase added to "d_i^u" above multiplied by the estimated number of gallons of gasoline to be sold during the period "u" at retail through service stations operated by employees of the refiner.

10 C.F.R. § 212.83(c)(2) (1975), 39 Fed. Reg. 12013 (April 2, 1974).

The three cent rule thus allowed refiners to pass through an additional three cents per gallon of increased product costs in sales of motor gasoline at refiner-operated stations. The rule, however, did not increase the total amount of increased product costs a refiner could recover. The refiner had to subtract the dollar amount recovered under the three cent rule from the amount of increased product costs otherwise available for recovery under d_i^u.[7]

3. *Deemed Recovery Rule*

In September 1974, without prior notice or opportunity for comment, and in reliance on the "good cause" exception to this procedural requirement, *see* 5 U.S.C. § 553 (b)(B), the FEA promulgated an amendment to the cost bank rule. 39 Fed. Reg. 32306 (Sept. 5, 1974). The amendment, addressing a supposed "ambiguity" in the Regulations and directed to preserving "customary price differentials," *id.* at 32307, made explicit that the requirement that refiners pass through increased product costs equally among classes of purchaser applied to actual, and not just maximum, selling prices. It also provided

[7] Thus, "the cents per gallon increase added to the retail price for gasoline multiplied by the estimated number of gallons to be sold in the period 'u'," was a separately computed term, to be subtracted from the numerator of the d_i^u formula set forth in note 5 *supra*.

for a "deemed recovery" penalty should actual prices not reflect equal application of costs:

> § 212.83. Allocation of refiner's increased costs.
>
> . . .
>
> (e) *Carryover of costs.*
>
> (1) . . . With respect to each special product . . . when a firm calculates the amount of increased product costs not recouped, which may be added to the May 15, 1973 selling prices to compute the base prices for that special product in a subsequent month, it shall calculate its revenues as though the greatest amount of increased product costs actually added to any May 15, 1973 selling price of that special product and included in the price charged to any class of purchaser, had been added, in the same amount, to the May 15, 1973 selling price of that special product and included in the price charged to each class of purchaser; except that, where an equal amount of increased product cost is not included in the price charged to a purchaser because of a price term of a written contract covering the sale of such product which was entered into on or before September 1, 1974, that portion of the increased product costs not included in the price charged to such a purchaser need not be included in the calculation of revenues.

10 C.F.R. § 212.83(e)(1) (1975).

Under the deemed recovery rule, then, the refiner had to pass through increased product costs uniformly among all classes of purchaser or suffer a cost recovery penalty. Specifically, each month the refiner was required to compute its bank of unrecovered costs as though it had charged *all* classes of purchaser the largest increment of increased costs it charged to any one class of purchaser, even though, in fact, it did not. If a refiner applied increased costs unequally, thus, it had to reduce its bank of

previously unrecouped costs by an amount that was larger than the amount of increased costs actually recouped. The refiner, that is, was "deemed" to have recovered costs it, in fact, did not. By penalizing selective price increases, therefore, the deemed recovery rule provided an economic incentive for equal pass through of increased product costs in actual selling prices.

In the September 5, 1974 rulemaking, the FEA stated that it intended to hold public hearings regarding proposed revisions to the Regulations and that, at that time, it would receive comments on the deemed recovery amendment. 39 Fed. Reg. at 32307. On September 10, 1974, the FEA published a notice of a proposed "comprehensive revision" of the Regulations. 39 Fed. Reg. 32718 (Sept. 10, 1974). The proposed revisions included certain modifications of the rules governing equal application of increased product costs and the recoupment of unrecovered increased product costs. *Id.* at 32718-24. The FEA received oral and written comments on the proposed revisions. On December 5, 1974, the FEA repromulgated the deemed recovery rule in its September 5, 1974 form. 39 Fed. Reg. 42368, 42372 (Dec. 5, 1974).

4. *May 1977 Three Cent Rule*

On January 27, 1977, the FEA published various amendments affecting the pricing of gasoline. One change modified the definition of d_i^a, altering it from a cents per gallon figure to a total dollar figure of increased product costs that a refiner could allocate to a given product. 42 Fed. Reg. 5030, 5031 (Jan. 27, 1977). This new definition did not contain the three cent retail price equalization rule that had been introduced into the definition of d_i^u in April 1974.

On May 5, 1977, without prior notice or opportunity for comment, and in reliance on the interpretive rule exemption to this procedural requirement, *see* 5 U.S.C.

§ 553(b)(A), the FEA published a "corrective amendment" to the price rule to replace the "inadvertently omitted" three cent rule:

> § 212.83 Price Rule . . .
>
> (h) *Equal Application among classes of purchaser* . . .
>
> (2) *Special Rules* . . .
>
> (iv) Retail sales of gasoline by refiners. When a refiner calculates the amount of increased costs not recouped that may be added to May 15, 1973, selling prices of gasoline to compute maximum allowable prices in a subsequent month, it may, notwithstanding the general rule in paragraph (b)(1) of this section, compute revenues as though (A) the greatest amount of increased costs actually added to any May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser that purchases gasoline at retail from a refiner at any service station operated by employees of the refiner had been added to the May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser that purchases gasoline at retail from a refiner at any service station operated by employees of the refiner had been added, in the same amount (less any actual differential or three cents per gallon, whichever is less) to the May 15, 1973 selling prices of gasoline and included in the price charged to all other classes of purchaser.

10 C.F.R. § 212.83(h)(2)(iv) (1978), 42 Fed. Reg. 22881 (May 5, 1977).

The FEA indicated that this new three cent rule was merely making explicit the equal application requirement, and deemed recovery penalty, that was implicit in the original three cent rule. *Id.*[8]

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[8] In this regard, it is notable that the original three cent rule was located in the section setting forth the refiner cost

In March 1978, Mobil filed a request for a formal interpretation of the three cent rule. The FEA ruled that, since its inception in April 1974, the three cent rule was but a "limited" exception to the equal application requirement. Although it permitted unequal recovery of increased product costs as between retail classes of purchaser of motor gasoline as a group and all other classes of purchaser of gasoline, it did "not authorize any price variations between individual refiner owned stations without penalty." *Mobil Oil Corp.*, Interp. no. 78-53, 43 Fed. Reg. 40207 (Feb. 11, 1978), 6 En. Mgmt. [CCH] ¶ 56444 (1978). *See Atlantic Richfield Co.*, Interp. 78-36, 43 Fed. Reg. 29541 (June 9, 1978), 6 En. Mgmt. [CCH] ¶ 56,427 (1978).

In the FEA's view, therefore, whenever, under the three cent rule, a refiner passed through $.03 of increased product costs to any one refiner-operated gasoline station, it would be deemed to have passed through the full $.03 to all refiner-operated stations even though, in fact, it did not.[9]

B. *Proceedings in the District Courts*

In January 1979, Mobil brought an action challenging the validity of the new three cent rule and, alternatively, of the September 1974 deemed recovery rule. Mobil's position was that by reading an equal application requirement and deemed recovery penalty into the three cent rule, at least among individual refiner operated stations, the new three cent rule did not merely interpret

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allocation formula (d_i^u), 10 C.F.R. § 212.83(c) (1975), while the new three cent rule was placed into the then-existing equal application provisions in the Regulations, 10 C.F.R. § 212.83(h) (1978).

[9] In this view, the deemed recovery rule would apply to the last term in the numerator of the d_i^u formula, the three cent rule term, *see* notes 5 & 7 *supra*, such that refiners would be subject to a cost recovery penalty if they passed through the three cent cost allowance unequally among refiner-operated gas stations.

the Regulations but substantively changed them. Accordingly, since the FEA did not follow notice and comment procedures in promulgating it, the new three cent rule was procedurally defective.

Mobil maintained that, under the rule as promulgated in April 1974, there was no requirement that recovery of the three cent allowance be uniform among classes of purchaser or among refiner operated gasoline stations. Mobil further argued that the September 5, 1974 deemed recovery rule applied only to the d_i increment and not to recovery of the three cent allowance. Should the district court have been inclined to a different view of the effect of the September deemed recovery rule on the three cent rule, Mobil, in the alternative, argued that the deemed recovery rule itself was procedurally invalid.

In the district court, the DOE pressed the position that the September deemed recovery rule by its terms applied to *all* increased product costs passed through in actual selling prices, including the three cent allowance. Thus, whether the three cent rule contained an equal application requirement and imposed a deemed recovery penalty in April 1974 *vel non*, it did so in September 1974. The 1977 rule, therefore, was merely an interpretive elaboration of the existing regulatory scheme. The DOE additionally maintained that the deemed recovery rule was validly promulgated in September 1974 under the "good cause" exception, and, further, validly repromulgated in December 1974.

The district court agreed with Mobil that, as promulgated in April 1974, the three cent rule "contained no equal application requirement pertaining to the pass-through of increased product costs . . . ." *Mobil v. DOE*, *supra*, 547 F. Supp. 1246, 1270. See *id.* at 1266. The district court, however, never ruled on the impact of the September 1974 deemed recovery rule on the April 1974 three cent rule. Rather, the court invalidated the deemed recovery rule as procedurally defective.

The court found there was no emergency in September 1974 justifying the FEA's bypass of the notice and comment procedures. *Id.* at 1268-69.[10] The court also rejected the argument that the deemed recovery rule was validly repromulgated in December 1974, finding that the September 10, 1974 notice of proposed rulemaking was inadequate to inform interested parties that the agency was evaluating the deemed recovery rule *de novo*. *Id.* at 1269.

Since there was no equal application requirement inherent in the April 1974 three cent rule and the September 1974 deemed recovery rule was procedurally invalid and, thus, a nullity, the May 1977 three cent rule effected a substantive change in the Regulations. Since the FEA promulgated this rule without following notice and comment procedures, it, too, was procedurally invalid. For these reasons, the district court entered summary judgment in favor of Mobil.

In January 1979, Naph-Sol brought an action to recover price overcharges allegedly incurred in its purchase of refined petroleum product from Murphy Oil Corp. Naph-Sol's claim that Murphy's prices were in excess of the maximum allowed under the Petroleum Price Regulations was, principally, two fold.[11]

First, Naph-Sol alleged that the price that Murphy charged on May 15, 1973 was in excess of that permitted by the parties' supply contract and, therefore, that Murphy used an unlawful May 15 price in calculating its maximum allowable price under the Regulations.

Second, Naph-Sol contended that Murphy computed its selling prices in violation of the equal application and deemed recovery requirements. Thus, Naph-Sol claimed

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[10] We will consider the procedural arguments in detail in Part IV *infra*.

[11] Naph-Sol's complaint also contained other allegations of regulatory and contractual violations. These other counts are not relevant to the present appeal.

that Murphy passed through increased product costs unequally and then computed its cost bank without regard to the deemed recovery principle. Murphy thereby calculated its prices to purchasers as though banked, unrecouped cost increases were available to be passed through when, under the deemed recovery rule, they were not. This resulted in overcharges to purchasers, of whom Naph-Sol was one.

On September 17, 1982, the district court granted summary judgment in favor of Murphy on the unlawful May 15 selling price claim and, on October 1, 1982, it granted summary judgment to Murphy on the deemed recovery rule violation claim. The district court ruled, as a matter of law, that the price Murphy charged Naph-Sol on May 15, 1973 was permissible under the supply contracts between the parties. There was, therefore, no contractual violation and, consequently, no regulatory violation. *Naph-Sol v. Murphy Oil Corp.*, *supra*, 550 F. Supp. at 305-06.

The court also invalidated the deemed recovery rule on procedural grounds. The court found that no emergency existed in September 1974. *Id.* at 322-23. Additionally, the court held that the deemed recovery rule was not validly repromulgated since the December 5, 1974 publication did not include an adequate statement of the basis and purpose for retaining the rule. *Id.* at 323-24. This ruling effectively disposed of Naph-Sol's claim that it was entitled to recover for overcharges due to Murphy's violation of the deemed recovery rule.

II. *Standard of Review*

The judicial review provisions of § 211(d)(1) of the Economic Stabilization Act, 12 U.S.C. § 1904 note, which were incorporated into the Emergency Petroleum Allocation Act by 15 U.S.C. § 754(a)(1), limit the scope of our review to a determination of whether regulations were issued in excess of agency authority, are arbitrary or

capricious, or otherwise not in accordance with law under the criteria set forth in 5 U.S.C. § 706(2).[12] The relevant provisions of 5 U.S.C. § 706(2) are:

> The reviewing court shall—
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .
>
> . . . . . .
>
> (D) without observance of procedure required by law . . . .

The Supreme Court, drawing on its earlier decisions in *Bowman Transportation Inc. v. Arkansas-Best Freight System*, 419 U.S. 281 (1974), and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), has recently summarized the appropriate scope of review under the arbitrary and capricious standard:

> The scope of review . . . is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'

Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Insurance Co., 103 S.Ct. 2856, 2866-67 (1983) (citation omitted). A reviewing court, thus, may not set aside an agency rule that is the product of reasoned decisionmaking, based on consideration of relevant factors, and within the scope of the authority delegated to the agency

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[12] The "substantial evidence" test mentioned in § 211(d)(1) of the ESA, 12 U.S.C. § 1904 note, expressly applies only to agency orders and not, as is the case here, to the issuance of regulations by means of informal rulemaking. *See* McCulloch Gas Processing Corp. v. DOE, 650 F.2d 1216, 1221 n.7 (Temp. Emer. Ct. App. [hereinafter TECA] 1981).

by statute. *See id.* at 2866, 2871. This court has followed the "rational basis" test. *See McCulloch Gas Processing Corp. v. DOE*, 650 F.2d 1216, 1221 (TECA 1981) (citing cases).

An agency's procedural compliance with statutory norms, however, is subject to closer scrutiny. The reviewing court, having competence in this arena, must satisfy itself that there was procedural integrity in the promulgation of the regulations in question. *See ITT World Communications v. FCC*, 699 F.2d 1219, 1246 (D.C. Cir. 1983); *National Resources Defense Council v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978). Nevertheless, although a court may exercise greater independent judgment when reviewing agency action on procedural, rather than substantive grounds, *see id.*, to the extent that the requisite procedures involve factual determinations, deference is still afforded to agency judgments. *See Philadelphia Citizens in Action v. Schweiker*, 669 F.2d 877, 886 (3d Cir. 1982) ("good cause" determination); *Coalition of Michigan Nursing Homes, Inc. v. Dempsey*, 537 F. Supp. 451, 458 (E.D. Mich. 1982) (same). The ultimate question remains whether or not the agency's action was arbitrary and capricious, that is, unreasonable. *See ITT v. FCC*, *supra*, 699 F.2d at 1246; *Philadelphia Citizens v. Schweiker*, *supra*, 669 F.2d at 886; *NRDC v. SEC*, *supra*, 606 F.2d at 1050.

Since we review the agency's actions on the identical basis as did the district courts, our review need accord no particular deference to the district courts' conclusions as to whether the administrative record does or does not support the administrative determination as reasonably based. *See Louisiana Environmental Society v. Dole*, 707 F.2d 116, 118 (5th Cir. 1983); *Committee for An Independent P-I v. The Hearst Corp.*, 704 F.2d 467, 472 (9th Cir. 1983); *Brown v. United States Dep't of the Interior*, 679 F.2d 747, 748-49 (8th Cir. 1982); *Philadelphia Citi-*

zens v. Schweiker, *supra*, 669 F.2d at 886 n.10. We are free to make an independent determination of the legal question as to whether the agency has made a showing of good cause. *See Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1171 (6th Cir. 1983); *Washington State Farm Bureau v. Marshall*, 625 F.2d 296, 306 (9th Cir. 1980). *See also Reeves v. Simon*, 507 F.2d 455, 458-59 (TECA 1974), *cert. denied*, 420 U.S. 991 (1975).

III. *Laches*

Initially, however, we must address DOE and Naph-Sol's contention that these 1979 challenges to the procedural validity of the 1974 deemed recovery rule are barred by laches. The district court in *Mobil v. DOE* considered and rejected the argument:

> Inasmuch as the focus of this action is upon the May 5, 1977 three cent rule, and in view of the relatively brief period of time between the issuance of the rule and the commencement of this action . . . this Court is not inclined to dismiss this action on the ground of laches.

547 F. Supp. at 1265. Although we recognize that laches is an equitable defense addressed to the sound discretion of the trial judge, *see, e.g., Moore v. Smith*, 694 F.2d 115, 119 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 1442 (1983); *University of Pittsburgh v. Champion Products*, 686 F.2d 1040, 1045 (3d Cir.), *cert. denied*, 103 S.Ct. 571 (1982); *Dickey v. Aloca Steamship Co.*, 641 F.2d 81, 82 (2d Cir. 1981), we cannot uphold the *Mobil* court's laches ruling.

By asking the district court to declare the 1974 deemed recovery rule invalid on procedural grounds, Mobil shifted the "focus" of this action. This is no less true because Mobil's challenge to the validity of the 1974 rule remains embedded within its challenge to the validity of the 1977 rule. The "focus" might reasonably be said to be the 1977 rule if this action involved merely the proper interpretation of the 1974 rule. Mobil, however, moved

the case considerably beyond this.[13] Moreover, there is no logical stopping place to the district court's "focus" analysis. New rules typically build on existing ones and an action to declare a current rule invalid could always be cast, in the alternative, as a challenge to the longstanding rule on which the new rule is premised. Under the district court's reasoning, since the "focus" would be on the new rule, laches could never bar the challenge to the old rule, no matter how untimely, or how prejudicial to the defendant. This argument ignores the basic equitable precepts that laches reflects and, as well, would seriously undermine administrative stability. It cannot be sustained.

Mobil, however, also urges that laches is not available in a "defensive" declaratory judgment action like that here. Mobil argues as follows. Statutes of limitations, and laches, do not run against defenses. Mobil therefore would be able to assert the procedural invalidity of the deemed recovery rule in an enforcement action brought by the DOE. Although nominally the "plaintiff" in the pre-enforcement declaratory judgment action now before the court, Mobil must be viewed in the context of its being the defendant in an enforcement action. Since DOE cannot raise laches in an enforcement action, it should not be permitted to raise laches in a declaratory judgment action seeking only to establish the validity of a defense to the anticipated enforcement action.

It is true that laches, and statutes of limitations, do not run against a defense. *See, e.g.*, 118 East 60th *Owners v. Bonner Properties*, 677 F.2d 200, 203 (2d Cir.

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[13] Although the DOE did draw attention to the deemed recovery rule, it was Mobil, both in its complaint, *see* Stip. Record pp. 000021-22, and in its motion for summary judgment, *see id.* pp. 000235-310, that put the question of the validity, as opposed to the interpretation, of this rule into issue. Absent this, the district court would not have ruled on the validity of the deemed recovery rule.

1982); *Northern Pacific Ry. Co. v. United States*, 277 F.2d 615, 623-24 (10th Cir. 1960); these doctrines are available "'only as a shield, not as a sword.'" *Id.* at 623-24 (citations omitted). There is little authority, however, on the question whether a declaratory judgment plaintiff like Mobil can, for these purposes, be assimilated to the status of a defendant; what there is suggests that it may not.

Thus, in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), which held that a pre-enforcement action for declaratory relief could be entertained by the courts if ripeness and exhaustion requirements were met, the Supreme Court stated:

> Further, the declaratory judgment and injunctive remedies are equitable in nature, and other equitable defenses may be interposed. . . . The defense of laches could be asserted if the Government is prejudiced by a delay.

Id. at 155 (citations omitted). One district court, in part relying on *Abbott*, has held that a pre-enforcement declaratory judgment action challenging the validity of the deemed recovery rule was properly characterized as "affirmative" in nature:

> [P]laintiff has had a claim for relief ripe from the institution of the regulations. That claim when it became ripe was not defensive in nature, but affirmative. . . . Without regard to the institution of administrative enforcement proceedings, plaintiff has had an equitable claim for relief since 1974. The interposition of the administrative proceedings does not alter the affirmative nature of this claim.

United Refining Co. v. DOE, Civ. No. 79-144, slip op. at 4-5 (W.D.Pa. 1983). Laches therefore was available to the DOE.[14]

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[14] In an earlier ruling, relied on by Mobil here, the district court had speculated that laches might not be available. *See* United Refining Co. v. DOE, 4 Energy Mgmt. (CCH) ¶ 26,264

We find it particularly difficult to view Mobil's challenge to the deemed recovery rule as "defensive." Mobil, presumably, anticipates being a defendant in an action to enforce the 1977 three cent rule and, thus, aims preemptively to establish the nonenforceability of that rule. Mobil's declaratory judgment action, however, goes considerably further: it challenges the validity of a rule other than the one whose enforcement is, ostensibly, impending. Although the 1974 deemed recovery rule might somehow be related to the 1977 rule, in these circumstances it would be stretching concepts far too thin to characterize Mobil's challenge to the deemed recovery rule as defensive, or to consider Mobil only "nominally" a plaintiff.

Accordingly, since it is clear that laches can be invoked against a declaratory judgment plaintiff who affirmatively challenges an agency rule, *see, e.g., Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary of DOE*, 683 F.2d 1171, 1175 (8th Cir. 1982); *Independent Bankers Assoc. v. Heimann*, 627 F.2d 486, 487 (D.C. Cir. 1980); *Michigan v. City of Allen Park*, 501 F. Supp. 1007, 1016-18 (E.D.Mich. 1980) (counterclaim); *cf. Energy Cooperative Inc. v. DOE*, 659 F.2d 146 (TECA 1981) (exhaustion of remedies), we find that laches is available to the DOE.

Laches reflects the principle that "equity aids the vigilant, not those who slumber on their rights." *Gull Airborne Instruments v. Weinberger*, 694 F.2d 838, 843 (D.C. Cir. 1982), quoting 2 J. Pomeroy, *Equity Jurisprudence* § 418 (5th ed. 1941). Two elements are essential

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(W.D.Pa. 1980). Upon further reflection, however, the court held to the contrary.

The other case relied on by Mobil, Luckenbach Steamship Co. v. United States, 312 F.2d 545 (2d Cir. 1963), involved a statute of limitations, not laches, and in any event, plainly sought only a simple declaration of non-liability for payments allegedly due.

to a laches defense: 1) inexcusable delay in instituting suit; and 2) prejudice to the defendant from such delay. *See, e.g., Gulf Airborne, supra*, 694 F.2d at 843; *University of Pittsburgh v. Champion Products, supra*, 696 F.2d at 1044.

Many of DOE's arguments with respect to delay and prejudice, on their face, are impressive. First, and most significantly, is the obvious fact that Mobil's procedural challenge is brought some five years after the fact of promulgation. Mobil and other oil companies promptly challenged other regulations issued at essentially the same time as the deemed recovery rule and there has been no satisfactory explanation of why, in this case, there was a delay. This is particularly significant here since the judicial review provision in § 211 of the Economic Stabilization Act, 12 U.S.C. § 1904 note, was expressly designed to ensure prompt review of agency action. *See* S.Rep. No. 92-507, 92nd Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Ad. News 2283, 2292-93.

The apparent effects of the delay are considerable. DOE would now be unable to cure any procedural informity by repromulgating the deemed recovery rule. It is arguable that invalidation at this juncture would run afoul of congressional intent with respect to petroleum pricing in the period of controls. There is some evidence that Congress never explicitly enacted equal application legislation because, in part, the deemed recovery rule existed. *See* S.Rep. No. 94-26, 94th Cong., 1st Sess. 37-38 (1975). Moreover, invalidation could be seen as prejudicing those refiners who had set their prices in accordance with the rule. Finally, the lost time and expense of DOE's ongoing enforcement actions is to be considered.[18]

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[18] Interestingly, in a separate action, Mobil invoked and apparently defended the deemed recovery rule to avoid liability under a New York statute. *See* Mobil Oil Corp. v. Tully, 499 F. Supp. 888, 904-07 (N.D.N.Y. 1980), *aff'd*, 658 F.2d 497 (TECA 1981), 639 F.2d 912 (2d Cir. 1981), *vacated and remanded on other grounds*, 455 U.S. 245 (1982).

Nevertheless, we cannot decide the merits of the laches defense on the present record. All else being equal, we would be inclined to remand the case for factual findings on the question of delay and prejudice. In view of the *Naph-Sol v. Murphy* appeal, however, we would not thereby be relieved of the responsibility of deciding the merits of the procedural validity of the deemed recovery rule.

Murphy raised its challenge to the validity of the deemed recovery rule as a defense to Naph-Sol's claim that it was overcharged due to Murphy's violation of the rule.[16] Although we recognize that this suit, unlike an ordinary contract action, implicates a regulatory scheme and not simply the rights of the parties, we believe that Murphy's challenge falls within the rule that laches does not run against a defense. Naph-Sol cannot both seek to recover payments and bar Murphy from defending by challenging the statutory basis upon which the claim for recovery is based. Murphy's procedural challenge, thus, cannot be barred by laches; the *Naph-Sol* appeal, therefore, cannot be decided on laches grounds. In view of this, and given our view of the deemed recovery rule issue, we proceed to decide both cases on the merits.

IV. *Validity of the Deemed Recovery Rule*

Before considering the validity of the deemed recovery rule, the subject matter of this section, one further issue, relevant to the *Mobil v. DOE* appeal, must be addressed. DOE's 1978 Interpretations of the three cent rule seemingly found that an equal application requirement, with a deemed recovery component, was inherent in the original April 1974 rule. If this were true, the May 1977 three cent rule could be upheld as an interpretive rule whether or not the September 1974 deemed recovery rule was valid. The district court, interpreting the language of the

[16] On appeal, Naph-Sol urges that Murphy's challenge is barred by laches, relying on essentially the same arguments with respect to delay and prejudice as does the DOE.

original three cent rule, and relying on this court's decision in *Standard Oil Co. v. DOE*, 596 F.2d 1029, 1040-45 (TECA 1978), held that the April 1974 three cent rule did not, of its own force, require that the three cent cost allowance be equally applied. In reaching this result, the court gave little weight to the agency interpretations to the contrary. 547 F. Supp. at 1266-67.

The DOE apparently has abandoned the position that an equal application requirement was implicit in the original three cent rule. Its brief on appeal makes no mention of the argument and, indeed, its summary judgment brief in the district court renounces it. *See* Stip. Record p. 000777. In view of this, and based on our reading of the regulations as of April 1974, we find it unnecessary to expand on the district court's analysis of this issue, which we adopt. Accordingly, the May 1977 three cent rule cannot be upheld as an interpretive rule without a consideration of the impact of the deemed recovery rule on it. We therefore finally turn to the question of the procedural validity of the deemed recovery rule.

A. *September 5, 1974 Rulemaking: Good Cause Exception*

The notice and comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*, and the Federal Energy Administration Act (FEAA), 15 U.S.C. §§ 761 *et seq.*, applied to FEA's September 5, 1974 promulgation of the deemed recovery rule. The FEA did not observe these requirements, relying on the "good cause" exceptions in each act.

Under the APA, an agency may promulgate a rule without prior notice and comment

> when the agency for good cause finds (and incorporates the finding in a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest.

5 U.S.C. § 553(b)(B). Under the stricter FEAA requirements, notice and comment

> may be waived where strict compliance is found to cause serious harm or injury to the public health, safety, or welfare, and such finding is set out in detail in such rule, regulation, or order.

15 U.S.C. § 766(i)(1)(B).

Notice and comment procedures afford interested parties a meaningful opportunity to participate in the rulemaking process and assure that an agency's decisions will be informed and responsive. *See, e.g., McCulloch Gas Processing Corp. v. DOE*, *supra*, 650 F.2d at 1221; *Mobil Oil Corp. v. DOE*, 610 F.2d 796, 802 (TECA 1979), *cert. denied*, 446 U.S. 937 (1980); *State of New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). Accordingly, exceptions to § 553 will be "narrowly construed and only reluctantly countenanced." *Id.*; *accord* S.Rep. No. 752, 79th Cong., 1st Sess. 16 (1945); *Kollett v. Harris*, 619 F.2d 134, 145 (1st Cir. 1980); *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 379-80 (3d Cir. 1979); *National Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 384-85 (2d Cir. 1978). Courts will closely examine the agency's proffered rationale, *see National Federation of Federal Employees v. Devine*, 671 F.2d 607, 610 (D.C. Cir. 1982) (per curiam); *Mobil Oil Corp. v. DOE*, *supra*, 610 F.2d at 804, but may uphold a finding of good cause justified by obvious and compelling facts that can be judicially noticed. *See National Helium Corp. v. FEA*, 569 F.2d 1137, 1141-46 (TECA 1977); *Nader v. Sawhill*, 514 F.2d 1064, 1068 (TECA 1975). The waiver provision of the FEAA is similarly to be used sparingly. *See* Sen. Conf. Rep. No. 93-788, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 2939, 2977. Despite the narrowness of the exceptions, we are persuaded that FEA had "good cause" for promulgating the deemed recovery rule without prior notice and opportunity for comment.

The preamble to the deemed recovery rule explained that the amendment was intended to clarify an "ambiguity" in the Regulations by putting

> all sellers . . . expressly on notice that prices actually charged, and not merely prices calculated as a lawful maximum, must reflect the equal application of increased product costs, except where a pre-existing contract prevents the implementation of such a price.

39 Fed. Reg. 32306, 32307 (Sept. 5, 1974). Although "most sellers" had been equally applying costs in prices below base prices,

> (a)s an improved supply situation has begun to have a restraining influence on prices, the FEA has become aware that certain sellers have taken the position that they may selectively 'bank' increased product costs as to certain classes of purchaser, for recoupment in a subsequent month, as long as the prices charged to other classes of purchaser do not exceed the maximum lawful price.

Id. Such practices "could obviously serve to avoid the intent of the overall framework of the price regulations," particularly the goal of preserving the "customary price differentials" among classes of purchaser. *See id.* The deemed recovery rule was designed to prevent this.

The FEA promulgated the rule without prior notice and comment, finding that an emergency existed and explaining that:

> [A]s the supply situation becomes more favorable, the incentive to depart from the equal application requirement becomes stronger. Moreover, announcement of these amendments as proposals would highlight current ambiguities in the regulations and could result in sellers seeking to take advantage of that ambiguity or of the contract exception to the regulation.
>
> The FEA has determined that the continuation or initiation of such practices would be injurious to the public welfare, in view of the number of circumven-

> tions of FEA regulations and the substantial compliance difficulties which would result.

According to appellants, then, the FEA feared that highlighting the gap in the Regulations through advance notice would promote discriminatory pricing against independent distributors and, as well, against certain regions of the country, particularly the Northeast. By passing through proportionately greater costs to independent outlets, for instance, refiners could threaten the competitive viability of the independents. Moreover, there was a risk that refiners would seek to take advantage of the "contract exception" [17] to the deemed recovery rule and "grandfather in" unequal cost pass-throughs to refiner operated stations by entering into long-term contracts. Thus, advance notice would result in severe market dislocations and erosion of the class of purchaser scheme so central to the Price Regulations, thereby justifying waiver of notice and comment procedures.

Both district courts rejected this argument, finding that the circumstances did not warrant dispensing with notice and comment procedures:

> Here, there was no compelling circumstances surrounding the discriminatory pricing practices cited by the agency. No users had been totally deprived of a supply of motor gasoline, no violence had surfaced or appeared imminent, and, more importantly, no sudden, disruptive change appears to have occurred with respect to either the distribution or pricing of motor gasoline on or about the time the September 5, 1974 rule had issued.

Mobil v. DOE, *supra*, 547 F. Supp. at 1269; *accord Naph-Sol v. Murphy Oil*, *supra*, 550 F. Supp. at 323.[18] We disagree, both as a matter of law and fact.

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[17] This exception permitted unequal application of increased product costs when existing contracts required refiners to sell product to customers at a price below that the refiner was charging to other classes of purchaser.

[18] "In the present case, there were no compelling circumstances surrounding the discriminatory pricing practices. . . .

"Good cause" is most typically found when circumstances pre-existing the rulemaking call for immediate agency response and waiver is required to accomplish the necessary speed. *See generally* K. Davis, *Administrative Law Treatise* § 6.29 (Supp. 1982).[19] Although it is not free from doubt, both district courts here appeared to find that, as a matter of law, this is the only sort of exigency that would justify by-passing the notice and comment procedure. On a number of occasions, however, this court has held that, in special circumstances, good cause can exist when the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare. *See Nader v. Sawhill*, *supra*, 514 F.2d at 1068; *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (TECA), *cert. denied*, 419 U.S. 896 (1974); *see also Reeves v. Simon*, *supra*, 507 F.2d at 458-59.

We recognize that agencies might frequently assert that someone will take advantage of the situation if advance notice is given. If the exception is not to become an all purpose escape-clause, therefore, the anticipated response must involve a significant threat of serious damage to important public interests. The circumstances in the present case perhaps were less "calamitous," *see Nader v. Sawhill*, *supra*, 514 F.2d at 1068, than where

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In September of 1974, there was no apparent disruption of petroleum supplies or distribution which created an immediate threat to the public." 550 F. Supp. at 323.

[19] A mere desire to provide guidance and information, or to clarify regulations, however, does not suffice for good cause. *Mobil v. DOE*, *supra*, 610 F.2d at 808. To the extent that the FEA justified the need for regulations on the basis of "clarifying ambiguities" alone, it would not amount to good cause. However, we understand the principal justification to be the harm attendant upon announcement of the proposed rule itself: refiners "taking advantage" of the situation. Moreover, FEA sought to do more than simply clarify ambiguities: "It sought to remedy shortcoming in its regulations which had become serious only as a result of sudden changes in market conditions." Shimek v. DOE, 685 F.2d 1372, 1375 (TECA 1981).

announcement of a future price increase would exacerbate existing oil supply shortages, *see id.*, or announcement of a future price freeze would generate a "massive rush to raise prices." *DeRieux v. Five Smiths*, *supra*, 499 F.2d at 1332. Nevertheless, in view of the emergency conditions prompting the petroleum price legislation, *see Pasco v. FEA*, 525 F.2d 1391, 1394 (TECA 1975), and assuming that announcement of the deemed recovery rule would cause price discrimination and other market dislocations and dampen competition, we find that the threat to the public would be sufficiently dire for good cause to be found.

The question thus becomes whether, as a matter of fact, FEA's finding of good cause is supported by the administrative record. It appears that the district courts were skeptical, and appellees here urge that there is no showing that in fact independents would be injured during the notice and comment period. In considering this question it is essential to recognize that we are being called upon, some eight years after the fact, to review agency determinations that were, in large measure, of a judgmental or predictive nature. Whether, in the economic circumstances of late summer 1974, independents and geographic regions were particularly vulnerable to price discrimination and, more importantly, whether refiners were likely to engage in discriminatory pricing if informed of the impending rule change, are not strictly factual questions; they involve subjective judgments.

Judgments of a predictive nature "necessarily involve deductions based on expert knowledge of the Agency"; complete factual support in the record "is not possible or required." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978); *accord NAACP v. FCC*, 682 F.2d 993, 1001 (D.C. Cir. 1982); *NRDC v. SEC*, *supra*, 606 F.2d at 1052; *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, *supra*, 103 S.Ct. at 2871-72. Since forecasts are not susceptible of

strict factual proof, they are, in the context of substantive agency decision making, entitled to special deference. The court must simply satisfy itself that the agency explains the facts and policy concerns it relies on and that, given these, a reasonable person could have made the judgment the agency did. *See NAACP v. FCC*, *supra*, 682 F.2d at 1001; *NRDC v. SEC*, *supra*, 606 F.2d at 1052. Admittedly, as our discussion in part II suggests, this extreme deference might be inappropriate in reviewing compliance with procedural requirements. Nevertheless, our examination of FEA's proffered good cause rationale must reflect the predictive element in the agency's determination and the agency's special expertise over such questions. *See generally* K. Davis, *Administrative Law Treatise* § 29.00-1 (Supp. 1982).

Although September 1974 was a period of increasing oil supply, it was still a volatile time, not that far removed from the Arab oil embargo of fall 1973, and far distant from the relative stability in the oil market of 1979 or 1983. Given the changed market conditions in late summer 1974, the relatively recent awareness that this was encouraging selective cost banking, and the policy of preserving the class of purchaser scheme, we are unable to say that the FEA's judgment that notice would lead to price discrimination and pressure on independents and regions was unreasonable. It is easy, in retrospect, to state that FEA's fears were exaggerated. FEA, however, was in a better position in August 1974 to appreciate the economic dynamics of the oil industry at that time than the courts are today; we must avoid being hampered by 20/20 hindsight. Certainly, just as "the announcement of a price increase at a future date *could* have resulted in producers withholding crude oil from the market," *Nader v. Sawhill*, *supra*, 514 F.2d at 1068 (emphasis added), and advance notice of a price freeze led to a "massive rush to raise prices," *DeRieux v. Five Smiths*, *supra*, 499 F.2d at 1332, announcement of the deemed recovery rule could have generated selective pricing and "grandfathering" of unequal prices in

favor of refiner-operated stations. We are not in a position to second-guess this judgment, or the determination that this would have contributed significantly to eroding the class of purchaser scheme and undermining competitive forces.

Moreover, no one claimed otherwise in September of 1974. None of the oil companies, who were not reluctant to challenge regulations, rejected the FEA's good cause argument by attacking the procedural validity of the deemed recovery rule in 1974 or 1975. This gives some credence to the FEA's predictive judgment and finding of good cause. So, too, do the numerous comments independents submitted to the FEA in response to the FEA's concern that independents and regions were susceptible to discriminatory pricing.[20] For these reasons, we conclude that the record supports FEA's good cause finding.

Appellees also argue that the September 5 preamble did not adequately recite the reasons for FEA's finding of good cause.[21] In particular, they contend that the FEA's supposed concern with price discrimination and solicitude for independents and geographic regions is simply a post-hoc rationalization advanced by appellants in these actions. We disagree.

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[20] These comments include those by: Independent Gasoline Marketers Council, app. at 01007; Independent Terminal Operators Association, app. at 01012; Powerine Oil Co., app. at 00322; Independent Fuel Terminal Operators Association, app. at 00811; Oil Heat Institute of Westchester, app. at 00800; New England Fuel Institute, app. at 00837.

[21] Appellees other arguments need be addressed only briefly. The harm that could have resulted from discriminatory pricing was clearly to the general public and not simply, as appellees maintain, to one segment of the petroleum industry.

The contention that FEA could have solved the problem by publishing a notice of proposed rulemaking that indicated that the rule would be effective as of the date of the notice proves too much since it would swallow the good cause exception as we have interpreted it in *Nader v. Sawhill, supra*, and *DeRieux*

In the September 5 preamble, the FEA indicated that some sellers were "selectively bank[ing] increased product costs as to certain classes of purchaser," while charging others the "maximum lawful price," 39 Fed. Reg. 32306, 32307 (Sept. 5, 1974), that the "improved supply situation" provided an "incentive" for sellers to engage in such practices, *id.*, and that announcement of the proposed amendment would prompt sellers "to take advantage of the situation." *Id.* We find this a sufficiently clear expression of concern with price discrimination. The September 5 preamble, it is true, did not specifically mention independents and regions of the country. The preamble, however, stated that a notice of hearings on proposed revisions of the Regulations would appear "in the near future," *id.*, which turned out to be September 10, 1974. The September 10 notice did explicitly indicate that the deemed recovery rule served to protect independents, and regions, from selective pricing. See 39 Fed. Reg. 32718, 32722-23 (Sept. 10, 1974). The September 10 notice was a contemporaneous statement of the agency's views, and not within the "made for litigation" rationalization proscribed by *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).[22]

For the foregoing reasons we conclude that the FEA was justified in using emergency rulemaking procedures to promulgate the deemed recovery rule under the APA,

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v. Five Smiths, supra. Moreover, the suggestion that we impose a new procedural requirement is contrary to Vermont Yankee Nuclear Power Co. v. NRDC, 435 U.S. 519 (1978).

[22] Moreover, even if the good cause statement were inadequate, we would be disinclined to invalidate the rule when we had found that, in fact, good cause existed, *see* Texaco Inc. v. FEA, 531 F.2d 1071, 1082 (TECA), *cert. denied*, 426 U.S. 941 (1976); *DeRieux, supra*, 499 F.2d at 1333, all the more so since the rulemaking here in issue preceded this court's admonition that "repeated technical noncompliance [with the APA] will not be tolerated." *Nader v. Sawhill, supra*, 514 F.2d at 1069.

and under § 7(i)(1)(B) of the FEAA, 15 U.S.C. § 766(i)(1)(B), as well. *See Shimek v. DOE*, 685 F.2d 1372, 1374-76 (TECA 1981); *Dorchester Gas Producing Co. v. DOE*, Civil No. CA-3-75-0836, slip op. at 18 (N.D. Texas June 24, 1983). Accordingly, we hold that the deemed recovery rule was validly promulgated on September 5, 1974. The decisions of the district courts on this issue were erroneous.

B. *December 5, 1974 Rulemaking*

Even had the September 5, 1974 promulgation been procedurally defective, the infirmity would have been cured by the rulemaking commencing on September 10, 1974 and concluding on December 5, 1974. Both district courts held that the deemed recovery rule was not validly repromulgated, the *Mobil* court finding that the September 10 notice was inadequate and the *Naph-Sol* court holding that the December 5 publication did not contain an adequate statement of "basis and purpose" with respect to the deemed recovery rule. We disagree.

1. *Adequacy of the September 10, 1974 Notice*

The APA requires that notice of a proposed rule be published in the *Federal Register* and include "either the terms or substance of the proposed rule or a description of the subjects and issues involved," 5 U.S.C. § 553(b)(3), and that interested persons be given an opportunity to comment on the rule. *Id.* § 553(c). The stricter FEAA required that notice "shall be given by publication of [the] proposed rule" in the *Federal Register* and that a "minimum of ten days following such publication shall be provided for opportunity for comment." 15 U.S.C. § 766(i)(1)(B).

Notice and the opportunity to comment serve to educate the agency, provide fair treatment to persons affected by the rule, and assist judicial review. *See Small Refinery Lead Phase-Down Task Force v. EPA*, 705 F.2d

506, 547 (D.C. Cir. 1983); *Standard Oil Co. v. DOE*, *supra*, 596 F.2d at 1057-58; *Shell Oil Co. v. FEA*, 574 F.2d 512, 516 (TECA 1978). Notice is sufficient if it "'fairly apprise[s] the interested parties' of the subjects and issues before the Agency," *American Iron and Steel Institute v. EPA*, 568 F.2d 284, 291 (3d Cir. 1977); *accord McCulloch Gas Processing Co. v. DOE*, *supra*, 650 F.2d at 1221, and thereby "affords interested persons a reasonable and meaningful opportunity to participate in the rulemaking process." *Id.*; *accord Atlantic Richfield Co. v. DOE*, 655 F.2d 1118, 1126 n.6 (TECA 1981).

In this instance, the basic question is whether the September 10 notice revealed FEA's willingness to reevaluate the deemed recovery rule [23] or, rather, that the agency's mind was closed. *See id.* at 1127 n.7; *Texaco Inc. v. FEA*, *supra*, 531 F.2d at 1078-79; *State of South Carolina ex rel. Patrick v. Block*, 558 F. Supp. 1004, 1020 (D.S.C. 1983).

The September 10 notice proposed the elimination of the equal application requirements with two exceptions: 1) within a given geographic marketing area the costs passed through to a class of purchaser including independents could not be greater than those passed through to classes of purchaser not including independents; and 2) the unequal pass through of costs as between marketing areas could not exceed 10%. 39 Fed. Reg. 32718, 32727 (Sept. 10, 1974) (proposed 10 C.F.R. § 212.83(c)(1)(iii)). The "cost bank" rule proposed on September 10 deleted the deemed recovery penalty as it had appeared in the September 5 promulgation. *See* 39 Fed. Reg. at 32729 (proposed 10 C.F.R. § 212.83(1)(d)).

The September 10 preamble expresaly reserved judgment on placing restrictions on the unequal pass through of costs as between regions:

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[23] We use this term as a shorthand to refer to the requirements that costs be applied equally in actual selling prices and that a deemed recovery penalty obtain when they are not.

> Comments are specifically requested on *whether this limitation on proposed regional flexibility in pricing is needed* and, if so, whether the proposed 10 percent limitation is appropriate.

Id. at 32723 (emphasis added). The preamble also stated that "to the extent that the current [equal application] requirement serves to protect the independent sector of the market, FEA has concluded that it must be retained." *Id.*

This last statement reveals that the FEA indeed was committed to protecting independents. Nevertheless, in view of the September 5 premable's promising an opportunity to comment on the deemed recovery rule; the deletion of the deemed recovery penalty in its September 5 form from the September 10 proposed rule; the elimination of other equal application requirements; and the solicitation of comments on the limitation on unequal pass throughs among regions, we do not find that the September 10 notice, taken as a whole, establishes that the agency was unprepared to reevaluate the deemed recovery rule.

Moreover, the reaction to the notice shows that interested parties were alerted that the deemed recovery rule was under review. Many of the comments from the large refiners urged repeal of the deemed recovery rule and all equal application requirements, while others proposed extensive revisions.[24] Independents, on the other hand, supported retention of the existing rules.[25] Our reading of these comments convinces us that interested parties did not believe that the FEA's mind was closed on the question of retention of the equal application/deemed recovery rule.

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[24] The commentators included: Mobil Oil Corp., app. at 00227; Marathon Oil Co., app. at 00295; Murphy Oil Corp., app. at 00113; Union Oil Co. of California, app. at 00345; Gulf Oil Corp., app. at 00645; Texaco, Inc., app. at 00888; American Petroleum Refiners Assoc., app. at 01021.

[25] *See* note 20 *supra*.

One other factor persuades us that the notice was sufficient to apprise interested parties that the deemed recovery rule was before the agency. Unlike as in the typical "inadequate notice" situation, the refiners, who presumably opposed the newly promulgated cost bank amendment, here had every incentive to read the September 10 notice of proposed rulemaking expansively, and to take it as an opportunity to comment on the deemed recovery rule and to urge its repeal.

For these reasons, we find the notice was adequate under the APA and the FEAA.[26]

2. *December 5, 1974 Publication: Statement of Basis and Purpose*

Effective December 1, 1974, the deemed recovery rule was readopted in its September 5, 1974 form as section 212.83(e) of the Petroleum Price Regulations, 10 C.F.R. pt. 212 (1975); 39 Fed. Reg. 42368 (Dec. 5, 1974). The district court in *Naph-Sol v. Murphy* held that this December 5, 1974 repromulgation was invalid since it did not include an adequate statement of the "basis and purpose"[27] for retaining the deemed recovery rule. 550 F. Supp. at 310.

The purpose of a contemporaneous "basis and purpose" statement is to facilitate meaningful judicial review by enabling the court to become aware of the legal and factual background of the agency's action. *Action on Smoking & Health v. CAB*, 699 F.2d 1209, 1215-16 (D.C. Cir. 1983); *State of Missouri ex rel. Freeman v. Block*, 690 F.2d 139, 143 (8th Cir. 1982); *Baltimore & Ohio Chi-*

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[26] The FEA published notice of the exact terms of the proposed rules in satisfaction of 15 U.S.C. § 766(i)(1)(B)'s requirements.

[27] The APA requires that "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c).

cago Terminal RR Co. v. United States, 583 F.2d 678, 687 (3d Cir.), *cert. denied*, 440 U.S. 968 (1978). Although an exhaustive listing of findings or a full analysis is not required, it is desirable for the agency to respond in a reasoned manner to the comments received and to explain how the decision was arrived at. *See Action on Smoking v. CAB*, *supra*, 699 F.2d at 1216. The statement of basis and purpose need not be published at the exact same moment as the rule. The inquiry must be whether "the rules and statement are published close enough together in time so that there is no doubt that the statement accompanies rather than rationalizes the rule." *Tabor v. Jt. Board for Enrollment of Actuaries*, 566 F.2d 705, 711 n.14 (D.C. Cir. 1977); *accord Baltimore & Ohio v. United States*, *supra*, 583 F.2d at 688.

In the December 5, 1974 preamble, the FEA indicated that it had decided to revise the price regulations on the pass through of *non*-product cost increases by refiners. The preamble continued:

> Action on all other revisions to the price regulations proposed in the September 10 notice is deferred until a later date. However, those possible revisions which have not been acted on continue to be under active consideration by FEA for decision in this proceeding.

39 Fed. Reg. at 42638.

Admittedly, this is hardly a model statement of the reasons for the agency's decision to retain the deemed recovery rule. Nevertheless, even when the basis and purpose statement is cursory, or, indeed, non-existent, a rule may be upheld when the agency's path may reasonably be discerned. *Alabama Ass'n of Insurance Agents v. Board of Governors of the Federal Reserve System*, 533 F.2d 224, 237 (5th Cir. 1976), *cert. denied*, 435 U.S. 904 (1978); *Hoving Corp. v. FTC*, 290 F.2d 803, 807 (2d Cir. 1961); *United States v. Exxon Corp.*, 561 F. Supp. 816, 828 (D.D.C. 1983); *see also DeRieux*

v. Five Smiths, *supra*, 499 F.2d at 1333. Such is the case here.

The September 5, 1974 preamble promised the opportunity to comment on the newly promulgated deemed recovery rule. 39 Fed. Reg. at 32307. The September 10 preamble canvassed in some detail the opposing policy considerations involved, principally the interest in permitting refiners flexibility in pricing to respond to market conditions as against the concern that regions and independents not suffer unfairly from "selective" flexibility. 39 Fed. Reg. at 32722-23. The comments the FEA received elaborated these competing positions. Despite the abbreviated statement of basis and purpose, then, FEA's reason for retaining the deemed recovery rule is reasonably clear: the agency concluded that the needs of regions and independents outweighed the benefits of price flexibility.

It should be apparent that the sort of truncated basis and purpose statement contained in the December 5 preamble is not recommended: an agency should respond meaningfully to comments and explain its decision. In this case, however, we are disinclined, some eight years after the event, to invalidate a rule on the technical ground of a deficient statement of basis and purpose when we can fairly discern the agency's aims.

Accordingly, we find that the December 5, 1974 promulgation was procedurally valid. The deemed recovery rule, therefore, was validly repromulgated as of December 1, 1974.

In sum, we hold that the deemed recovery rule was validly promulgated on September 5, 1974 and validly repromulgated on December 5, 1974. The decisions of the district courts on this question are reversed. Since the *Mobil* court's ruling that the May 1977 three cent rule was procedurally invalid was premised on the invalidity of the 1974 deemed recovery rule, that ruling is vacated. The case is therefore remanded for considera-

tion of the impact of the September 1974 deemed recovery rule on the April 1974 three cent rule, directed toward determining whether the May 1977 three cent rule was validly promulgated as an interpretive rule.

That portion of *Naph-Sol v. Murphy* ruling that Naph-Sol was not entitled to recovery for overcharges due to Murphy's violation of the deemed recovery rule is vacated. The case is remanded for determination of whether, in fact, Murphy violated this rule and overcharged Naph-Sol thereby. Unlike our review of *Mobil v. DOE*, our review of *Naph-Sol v. Murphy* is not yet complete. We must consider the claim that Murphy's May 15, 1973 selling price was in violation of the contract between the parties and, therefore, of the Price Regulations.

V. *Price Overcharge: May 15, 1973 Transaction Price*

A. *Jurisdiction*

Initially, Murphy raises the question of our jurisdiction over Naph-Sol's appeal from the district court's determination that the prices Murphy charged Naph-Sol on May 15, 1983 were permissible under the parties' supply contracts and, therefore, lawful under the Price Regulations.[58]

Section 211(b)(2) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, granted the Temporary Emergency Court of Appeals "exclusive jurisdiction over all appeals from the district courts of the United States in cases and controversies arising under this title or un-

[58] Under the Regulations, a refiner's base price was "the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973 plus increased product costs . . ." 10 C.F.R. § 212.82(b)(1) (1975). The maximum allowable price was base price plus allowable nonproduct cost increases. Naph-Sol alleges that it constituted a separate and individual single member class of purchaser.

der regulations or orders issued thereunder." Section 5 of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754(a)(1), incorporated this special grant of jurisdiction. Two principal inquiries guide our determination of TECA jurisdiction: whether resolution of the litigation in its entirety requires the application or interpretation of the EPAA and regulations, *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 591 F.2d 711, 716 (TECA), *cert. denied*, 444 U.S. 879 (1979), and whether an EPAA issue has been adjudicated in the district court. *Texaco Inc. v. DOE*, 616 F.2d 1193, 1198 (TECA 1979); *Coastal States Marketing Inc. v. New England Petroleum Corp.*, 604 F.2d 179, 187 (2d Cir. 1979); *see Francis Oil & Gas Inc. v. Exxon Corp.*, 687 F.2d 484, 487 (TECA 1982).

Naph-Sol seeks recovery for overcharges pursuant to § 210(b) of the ESA, 12 U.S.C. § 1904 note. Thus allegations in the complaint implicate the EPAA and its implementing regulations. Indeed, the claim rests entirely on the Regulations and its resolution involves their application. The interpretation of the terms of the supply contracts between Naph-Sol and Murphy was incident to, and interwoven with, the question whether Murphy's May 15, 1973 selling price was lawful under the Regulations. Although based on its interpretation of the contract, the district court was required to resolve the litigation and held that Murphy had not violated the Price Regulations; therefore, an EPAA issue has been adjudicated and we have jurisdiction over this appeal. *See Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp., supra*, 591 F.2d at 716; *Mountain Fuel Supply Co. v. R. Johnson & Johnson Oil Co.*, 586 F.2d 1375, 1384 (10th Cir. 1978).

B. *Merits*

The contract prices in each of the two supply agreements between Naph-Sol and Murphy[20] were set by ref-

[20] The first contract governed purchases by Naph-Sol at Murphy's terminal at Ferrysburg, Michigan; the second gov-

erence to, and fluctuated with, "Platt's Chicago Postings," [20] but were "subject to . . . minimum and maximum prices" for each product. Stip. Record on Appeal at 89-94. Under the contracts, Naph-Sol was required to purchase a minimum of 7.5 million gallons of motor gasoline at Ferrysburg and 1 million gallons of gasoline at Marquette. The supply agreement also included a "price adjustment" clause, which read as follows:

> Price Adjustment. MURPHY reserves the right at any time during the period of this agreement to increase or decrease the agreement price provided for herein. In the event any such increase or decrease in price is unacceptable to Purchaser, Purchaser shall have the right to cancel the agreement on written notice insofar as the particular product or products involved are concerned, said cancellation to be effective at the time stated in said notice. On the failure of Purchaser to exercise this right of cancellation, the increase or decrease in prices shall become automatically effective.

Id. at 91.

On or shortly before May 15, 1973, Murphy began to charge prices in excess of the maximum stated in the supply agreements.[21] Naph-Sol accepted fuel shipments and paid these higher prices. Naph-Sol, which purchased petroleum from Murphy at least through the filing of its complaint in 1979, alleges that the prices charged by

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erned purchases at Murphy's terminal at Marquette, Wisconsin.

[20] Platt's Chicago Posting is an average of refiners' posted prices at Chicago, Illinois, for a particular refined product, as published in *Platt's Oilgram*, a daily industry newsletter.

In the Ferrysburg contract, Naph-Sol agreed to pay Murphy a price equal to Platt's Chicago Posting minus $.0025 per gallon, and in the Marquette contract, Platt's Chicago Posting plus $.0025 per gallon.

[21] These prices were based on Murphy's prevailing terminal wholesale postings ("rack prices").

Murphy violated the supply contracts and, therefore, the Price Regulations. Murphy, relying on the price adjustment provision, maintains the prices were valid under the contracts.

The district court granted summary judgment in favor of Murphy. The court found that the contract terms were unambiguous and that the price adjustment provision permitted Murphy to charge Naph-Sol prices in excess of the maximum in the supply agreements. Since Naph-Sol accepted fuel shipments at these prices, under the price adjustment clause the prices automatically became effective. The court rejected Naph-Sol's argument that the price adjustment term was inconsistent with the minimum-maximum provision and that the specific term (the minimum-maximum term) governed over the general term. Under the agreements Naph-Sol was obligated to purchase minimum amounts of gasoline when prices were within the minimum and maximum range. Naph-Sol, however, could be excused from meeting its minimum purchase requirements if Murphy increased its prices in accordance with the price adjustment clause. The two provisions, the court reasoned, are therefore not inconsistent. *Naph-Sol v. Murphy Oil*, *supra*, 550 F. Supp. at 306.

We agree with the district court's construction. The contract terms are unambiguous. In particular, by its plain language the price adjustment clause authorized Murphy to increase its prices beyond those expressly provided for in the contracts.[22] Contrary to Naph-Sol's

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[22] Naph-Sols's argument that the price adjustment clause meant that Murphy could arbitrarily choose to vary prices within the minimum-maximum range ignores the plain language stating that Murphy could, at any time, "increase or decrease the agreement price provided herein." The agreement price can only be understood as the Platt's Chicago Posting price up to the maximum. Moreover, under Naph-Sol's interpretation, it would have had the right to cancel the contract even when the price Murphy charged was within the contract ceiling. This interpretation is not plausible.

argument, advanced in the district court and renewed on appeal, this provision may reasonably be harmonized with the minimum-maximum clause, as the district court has shown, such that effect many be given to all the terms in the contract.[33]

Accordingly, we hold that Murphy's May 15, 1973 selling price was permissible under the parties' supply agreements and, therefore, that Murphy used a lawful May 15, 1973 transaction price under the price regulations.

VI. *Conclusion*

In conclusion, we rule as follows. In *Mobil v. DOE* we hold that: 1) the April 1974 three cent rule did not itself require equal application of the three cent cost allowance; 2) the promulgation of the deemed recovery rule on September 5, 1974 was procedurally valid; and 3) the repromulgation of the deemed recovery rule on December 5, 1974 was procedurally valid. The district court's judgment that the May 5, 1977 three cent rule was procedurally invalid is vacated. The case is remanded for consideration of the impact of the deemed

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[33] Naph-Sol urges that it would be "ridiculous" for it to have entered a contract that gave Murphy the power unilaterally to raise prices with Naph-Sol's only recourse being to terminate the contract. This being as it may, when the contract is unambiguous, the courts may not write a party a better agreement than it entered.

Naph-Sol frequently refers to the price adjustment clause as mere "boilerplate" in a "form contract" prepared by Murphy as though, somehow, the term therefore did not count. Naph-Sol, however, does not allege that this was a contract of adhesion and, given the status of the parties, there is no suspicion that it was. Further, the contract was only three pages in length, typed, and easily readable. Moreover, on the first page, ¶ 4 specifically stated that "The Provisions of Agreement stated below, except those that by their terms are inapplicable, are part of this agreement." Stip. Record on Appeal 89. The price adjustment clause was found under the "Provisions of Agreement."

recovery rule on the April 1974 three cent rule and, in this light, of the procedural validity of the May 1977 three cent rule.

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

In *Naph-Sol v. Murphy Oil* we hold that: 1) Murphy's May 15, 1973 selling price was permissible under the parties' supply contracts and lawful under the price regulations; 2) the promulgation of the deemed recovery rule in September 5, 1974 was procedurally valid; and 3) the repromulgation of the deemed recovery rule on December 5, 1974 was procedurally valid. The case is remanded for determination of whether, in fact, Murphy violated the deemed recovery rule and thereby overcharged Naph-Sol.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

United States District Court
NORTHERN DISTRICT OF NEW YORK

79-CV-11

MOBIL OIL CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION and MARATHON OIL COMPANY,

Plaintiffs,

-against-

THE DEPARTMENT OF ENERGY, and JAMES B. EDWARDS, Secretary of Energy,

Defendants.

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MEMORANDUM—DECISION AND ORDER

The plaintiff oil refiners have instituted this action to obtain declaratory relief in connection with certain provisions of the Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212, that pertained to motor gasoline. Specifically, the plaintiffs have challenged the procedural and substantive validity of a "three cent" retail price equalization rule which contained a "deemed recovery" component. Alternatively, they have contested the validity of an "equal application" rule, which also contained a deemed recovery component. Jurisdiction is invoked under Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 [EPAA], 15 U.S.C. § 754(a)(1), Section 211 of the Economic Stabilization Act of 1970 [ESA], 12 U.S.C. § 1904 note, Section 523(b) of the Energy Policy and Conservation Act, 42 U.S.C. § 7192; Section 502 (b) of the Department of Energy Organization Act, 42 U.S.C. § 7192(b), the Administrative Procedure Act, 5 U.S.C. § 702, and under 28 U.S.C. §§ 1331, 1337, 1361, 2201, and 2202.

Presently before the Court are the plaintiffs' motion for summary judgment, and the defendants' cross-motion for summary judgment.

I.

In 1971, President Nixon announced his Economic Stabilization Program, which, as embodied in the ESA, was intended to halt the rising tide of inflation, which, at that time, was plaguing the country. A supervisory body of this Program, the Cost of Living Council [CLC], was delegated the authority to issue regulations necessary to the accomplishment of this objective.

Beginning in 1973, the CLC, in an effort to stem the spiraling prices of petroleum products, promulgated a number of rules that imposed mandatory price controls upon refiners. *See* 38 Fed. Reg. 15765 (June 15, 1973); 38 Fed. Reg. 19464 (July 20, 1973); 38 Fed. Reg. 21593 (August 9, 1973); 38 Fed. Reg. 22536 (August 22, 1973); 38 Fed. Reg. 23794 (September 4, 1973); 38 Fed. Reg. 25686 (September 14, 1973); 38 Fed. Reg. 28845 (October

17, 1973); 38 Fed. Reg. 30267 (November 2, 1973); 38 Fed. Reg. 31686 (November 16, 1973); 38 Fed. Reg. 33577 (December 6, 1973). Although these controls placed ceilings upon the maximum prices that refiners could charge for motor gasoline, they did not purport to forbid refiners from setting prices that were less than the regulatory limitations. *See* 38 Fed. Reg. at 15765; 38 Fed. Reg. at 19464.

Congress also sought to limit petroleum prices. In November, 1973, it enacted the EPAA, which directed the President to issue regulations governing the pricing and allocation of crude oil and petroleum products. *See* 15 U.S.C. § 753(a). In Section 4(b)(1) of the original, and amended, EPAA, Congress directed the President to promulgate regulations that would provide for:

> (A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;
>
> (B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);
>
> (C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;
>
> (D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;
>
> (E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—

(i) fuels, and

(ii) minerals essential to the requirements of the United States,

and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

15 U.S.C. § 753(b)(1)(A)-(L). In setting forth Section 4(b)(1)(F), 15 U.S.C. § 753(b)(1)(F), Congress was particularly concerned with the problem of price discrimination: "The reference to equitable prices in the bill is specifically intended to emphasize that one of the objectives of the mandatory allocation program is to prevent price gouging or price discrimination which might otherwise occur on the basis of current shortages." H.R. Rep. No. 93-628, 93rd Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Admin. News at 2702.

Section 4(b)(2) of the EPAA, as originally adopted, specified that the President's regulations should "provide for a dollar-for-dollar passthrough of net increases in the cost of . . . refined petroleum products to all marketers or distributors at the retail level." 15 U.S.C. § 753(b)(2)(A). The purpose of this provision is set forth in the legislative history:

> [I]t is contemplated that prices for allocated fuels will be set at levels or pursuant to methods which will permit adequate compensation to assure that private property is not implicitly confiscated by the government. Most

> importantly, the president must, in exercising his authority, strike an equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of an adequate supply of product and of holding down spiraling consumer costs.

H.R. Rep. No. 93-628, 93rd Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. and Admin. News, at 2703. In 1975, this provision was amended to read: "refined petroleum products at all levels of distribution from the producer through the retail level."

Following the passage of the EPAA, in December, 1973, the President created a predecessor agency of the Department of Energy [DOE], and delegated to this agency his authority under the EPAA. *See* 38 Fed. Reg. 33575 (December 6, 1973). The CLC subsequently delegated its authority under the ESA to this same agency. *See* 39 Fed. Reg. 24 (January 2, 1974).

In January, 1974, the new agency adopted the CLC's price rules, and published them as the Mandatory Petroleum Price Regulations. *See* 39 Fed. Reg. 1949 (January 15, 1974). These Regulations laid down guidelines affecting the maximum prices that a refiner could charge for the sale of "covered products", which included crude oil and "special products" such as motor gasoline. *See* 10 C.F.R. 212.31, 39 Fed. Reg. at 1950, 1951.

One critical feature of the Regulations was a "price rule." Set forth in 10 C.F.R. § 212.82(a), this rule provided that "[a] refiner may not charge to any class of purchaser a price in excess of the base price" of motor gasoline except under certain specified circumstances. 39 Fed. Reg. at 1952. In this regard, "class of purchaser" was defined as "purchasers . . . to whom a person has charged a comparable price for comparable property or services pursuant to customary price differentials between these purchasers. . . and other purchasers. . . ." 10 C.F.R. § 212.31, 39 Fed. Reg. at 1950.

As used in the price rule, and in other provisions, "base price" represented the sum of (1) a refiner's weighted average price at which motor gasoline was lawfully priced in transactions with a particular class of purchaser on May 15, 1973; and (2) a refiner's

increased "product" costs, or increases in the costs of crude oil and purchased products since May, 1973, 10 C.F.R. § 212.83(b), 39 Fed. Reg. at 1954. 10 C.F.R. § 212.82(f); 39 Fed. Reg. at 1953. Increased "product" costs were determined according to a refiner cost allocation formula. This formula yielded a cents-per-gallon figure referred to as "d_i^u", which denoted the maximum amount of increased "product" costs that a refiner could apportion to a special product like motor gasoline:

> § 212.83. Allocation of refiner's increased product costs.
>
> * * * * *
>
> (c) *Allocation of increased-costs—*
>
> * * * * *
>
> (2) *General formulae:*
>
> * * * * *
>
> d_i^u = the dollar increase that may be applied in the period "u" (the current month) to the May 15, 1973 selling price of [a special product] to each class of purchaser to compute the base price to each class of purchaser.

10 C.F.R. § 212.83(c)(2), 39 Fed. Reg. at 1955.

To the "base price" a refiner could add certain increased "non-product" costs, or increases in the costs of refining and transporting petroleum products that had been incurred since May, 1973. 10 C.F.R. § 212.83(a) and (b), 39 Fed. Reg. at 1952-53. Under the price rule, this new sum, a "price in excess of base price," could not be recovered by a refiner unless the refiner satisfied certain profit margin limitations and complied with a prenotification procedure that required advance notice of the proposed price increase to the agency for its implicit or explicit approval. 10 C.F.R. §§ 212.82(c)(1) and (2)(i), 212.82 (i), 39 Fed. Reg. at 1952, 1954. In addition to these restrictions, a refiner could charge for motor gasoline a "price in excess of base price" only if it "equally applied to each class of purchaser" the amount of

increased "non-product" costs allocable to that special product. 10 C.F.R. § 212.82(c)(2)(i)(b), 39 Fed. Reg. at 1953.

Another important feature of the Regulations was a "cost bank rule", contained in 10 C.F.R. § 212.83(d)(1), 39 Fed. Reg. at 1956. Because the price rule placed limitations upon the prices that a refiner could charge for special products, such as motor gasoline, occasions arose when a refiner could not recover all its increased "product" costs. The cost bank rule addressed these situations, and permitted a refiner to carry over, or "bank", its unrecovered increased "product" costs for inclusion in the calculation of base prices for motor gasoline in a later month:

> § 212.83. Allocation of refiner's increased product costs.
>
> * * * * *
>
> (d) *Carryover of costs.* (1) If in any month . . . a firm charges prices for a special product which result in the recoupment of less total revenues than the entire amount of increased product costs calculated for that product pursuant to the general formula. . . ., the amount of increased product costs may be added to the May 15, 1973 selling prices to compute the base prices for that special product for a subsequent month.

Independent retailers operated under a pricing system similar to that scheme imposed upon refiners. In January and February, 1974, however, the agency issued rules permitting independent retailers to increase their retail selling prices for motor gasoline by up to $.03 per gallon in order to reflect "nonproduct" costs incurred in the marketing of motor gasoline. *See* 39 Fed. Reg. 809 (January 3, 1974); 39 Fed. Reg. 7795 (February 28, 1974). A refiner could take advantage of this allowance for increased "nonproduct" costs only if it first satisfied the price rule limitations upon the recovery of a "price in excess of base price." Because of these strictures, refiner-operated stations generally chose not to undertake the burden of increasing motor gasoline prices by $.03

per gallon. Independent retailers of motor gasoline then had to decide whether to charge an additional $.03 per gallon above prices charged by refiner-operated stations, and thereby recover their increased "non-product" costs, or to absorb the $.03 per gallon allowance by selling at prices competitive with those charged by refiner-operated stations.

On April 2, 1974, the agency responded to a "price disparity" that had developed between independent and refiner-operated stations by publishing an amendment to the general refiner cost allocation formula for determining "d_i^u", the amount of increased "product" costs:

§ 212.83. Allocation of refiner's increased product costs.

* * * * *

(c) *Allocation of increased-costs.*

* * * * *

(2) *General Formulae:*

* * * * *

d_i^u = The dollar increase that may be applied in the period "u" (the current month) to the May 15, 1973 selling price of [a special product] to each class of purchaser to compute the base price to each class of purchaser, except that the dollar increase that may be applied in the period "u" to the May 15, 1973 selling price of gasoline to compute the base prices to the classes of purchaser which purchase gasoline at retail from a refiner at service stations operated by employees of the refiner may be "d_i^u" plus a maximum of $.03 per gallon of gasoline provided that in computing "d_i^u" the numerator of the [general formula] is reduced by an equal amount to the product of the actual amount to cents per gallon increased added to "d_i^u" above multiplied by the estimated number of gallons of gasoline to be sold during the period "u" at retail through service stations operated by employees of the refiner. . . .

10 C.F.R. § 212.83(c)(2), 39 Fed. Reg. 12013-14 (April 2, 1974). According to the agency, this refiner "retail price equalization" rule, or "three cent" rule, "permit[ted] a refiner to allocate an additional three cents of its increased product costs" to gasoline prices charged at refiner-operated stations, "provided that a corresponding reduction in the amount of increased product costs allocated to the price of gasoline sold through independent dealer-operated stations is made." 39 Fed. Reg. at 12013. The agency noted further that while the amendment did "not change the total amount of increased product costs" which a refiner could pass through, it did "permi[t] an adjustment in the allocation of those costs which should result in an equalization of the price charged for gasoline produced by the refiner at the retail level." *Id.* Finally, the agency explained that because the "purpose" of the amendment was "to provide immediate guidance and information. . . and to permit the amendment to be implemented during the month of April," normal rulemaking procedures would be "impracticable" and "good cause" existed for making the amendment effective in less than thirty days. *Id.*

Subsequently, according to the agency, an "ambiguity" became apparent in the Regulations. 39 Fed. Reg. 32307 (September 5, 1974). The ambiguity, the agency stated, could be best understood by reference to a "fundamental" tenet of the Regulations, namely, the "equal application of increased product costs among classes of purchaser." *Id.* As the agency related:

> The concept of preserving the customary price differentials that existed as of May 15, 1973 among various classes of purchaser of a particular covered product is fundamental to the . . . system of price regulations, and has been expressed in various . . . rules. Under the refiners' price rules, for example, a formula is provided for determining a uniform cents per gallon increment of increased product costs which may be applied to the May 15, 1973 selling price to each class of purchaser, in order to determine the base price for that product to that class of purchaser. The base price is the maximum lawful price for the sale of that product to that class of purchaser. The intent of this regulatory framework was to preserve the "customary price

> differentials" between "class of purchaser" in § 212.31, by requiring the application of equal amounts of increased product costs to the May 15, 1973 selling price to each class of purchaser.

Id. While observing that, "[i]n general, these regulations have resulted in the equal application of increased product costs among classes of purchaser," the agency cited an "ambiguity" in the Regulations, which was that "sellers are not specifically required actually to charge the prices arrived at under the regulations." *Id.* The agency then specified the problem:

> As an improved supply situation has begun to have a restraining influence on prices, the [agency] has become aware that certain sellers have taken the position that they may selectively 'bank' increased product costs as to certain classes of purchaser, for recoupment in a subsequent month, as long as the prices charged to other classes of purchaser do not exceed the maximum lawful price. Such practices could obviously serve to avoid the intent of the overall framework of the price regulations, and the [agency] is undertaking to insure that these pricing practices are not put into effect.

Id.

To remedy this perceived situation, the agency, on September 5, 1974, published an amendment to its cost bank rule regarding the banking of increased "product" costs, effective September 1, 1974. The purposes of the amendment, which issued without a prior opportunity for public comment, were

> to clarify and make explicit the requirement that prices charged for each covered product must reflect the equal application of increased product costs to each class of purchaser, and that failure to charge prices that reflect equal application of increased product costs except to the extent the seller is precluded from charging such prices by the price term of a contract . . . will result in unrecouped increased product costs which the seller will not be permitted to recover in a subsequent month.

* * * * *

> [to put] all sellers . . . expressly on notice that prices actually charged, and not merely prices calculated as a lawful maximum, must reflect the equal application of increased product costs, except where a pre-existing contract prevents the implementation of such a price.

Id. at 32306-07. As amended, the cost bank rule for special products now included an explicit equal application rule, with a deemed recovery component, and affected both actual and maximum lawful prices:

> § 212.83. Allocation of refiner's increased product costs.
>
> * * * * *
>
> (d) *Carryover of costs.*
>
> * * * * *
>
> (1) * * * With respect to each special product . . ., when a firm calculates the amount of increased product costs not recouped, which may be added to the May 15, 1973 selling prices to compute the base prices for that special product in a subsequent month, it shall calculate its revenues as though the greatest amount of increased product costs actually added to the May 15, 1973 selling price of that special product and included in the price charged to any class of purchaser, had been added, in the same amount, to the May 15, 1973 selling price of such product and included in the price charged to each class of purchaser; except that, where an equal amount of increased product cost is not included in the price charged to a purchaser because of a price term of a written contract covering the sale of such product which was entered into on or before September 1, 1974, that portion of the increased product costs not included in the price charged to such a purchaser need not be included in the calculation of revenues.

10 C.F.R. § 212.83(d)(1), 39 Fed. Reg. at 32308. In explaining the rule, the agency stated that "[i]n order to make [the]

requirement [concerning the equal application of increased product costs in prices actually charged] explicit," it was issuing an amendment to its "banking" provision:

> [F]or each product, the recoupment of increased product costs will be calculated on the assumption that the largest amount of increased product cost added to the May 15, 1973 selling price and included in the price charged to any class of purchaser was equally applied to the May 15, 1973 prices and included in the price charged to all classes of purchaser, without regard to whether such prices were in fact charged.

39 Fed.Reg. at 32307. An exception to this rule was where a contract in existence on or before September 1, 1974 required a seller to charge a price less than the price that would reflect the equal application of increased costs. *Id.* In this regard, the agency noted that the amendment to the carryover provisions did not "alter in any respect the ability of a seller to charge prices to all classes of purchaser of a covered product which reflect the application of less than all available increased costs, and to carry forward the amount of increased costs which are not applied for recovery in a subsequent month." *Id.* Instead, the agency stated, the "clarification simply makes explicit the limitation that a seller may not select among classes of purchaser of the same product those classes as to which it will apply increased costs and those classes as to which it will 'bank' increased costs." *Id.* Next explaining that under "[t]his approach, which is implicit in the existing regulations . . . all sellers continue to be afforded the opportunity . . . to pass through all of their increased product costs," the agency went on to emphasize that

> [w]here, however, a seller chooses to charge prices for a product which reflect disparate application of increased product costs among classes of purchaser, the carryover of unrecouped increased costs will not be permitted to the extent that any class of purchaser had a lesser amount of

> increased costs applied to its prices than did another class of purchaser of the same product.

Id.

As for the suspension of the usual notice and comment opportunities, the agency announced that it had made a "finding" that an emergency existed which required immediate action. *Id.* at 32307-08. Stating that it had recently learned that "certain sellers have implemented and continue to implement prices which do not conform to the . . . concept of preserving May 15, 1973 price differentials among various classes of purchaser," that the ambiguity in the Regulations made compliance efforts against such sellers more difficult, that a more favorable supply situation had strengthened the incentive not to apply the equal application requirement, and that announcement of the amendment as a mere proposal could draw attention to the ambiguity and prompt sellers to take advantage of the situation, the agency expressed its conclusion that "the continuation or initiation of such practices would be injurious to the public welfare." *Id.* at 32307. The agency then stated that it intended to have public hearings regarding proposed revisions to the Regulations, and that, at that time, it would receive public comments concerning the amendment to the cost bank rule. *Id.* Notice of the proposed hearings, the agency related, would appear "in the near future." *Id.*

The near future arrived on September 10, 1974. On that day, the agency published notice of a proposed "comprehensive revision" of the Regulations. *See* 39 Fed. Reg. 32718 (September 10, 1974). As represented by the agency, the revision was designed "to simplify and clarify the price regulations, while retaining the essential concepts of the regulations as they were initially issued"; "to eliminate regulatory restrictions that are no longer needed or inappropriate in the context of current conditions"; and "to help restore the role of competition within the overall structure of the price regulations, so that traditional market forces may begin to supplant the rigid controls of price regulations as the price setting mechanism." *Id.* The proposed revision included both the elimination of the prenotification requirement regarding the recovery

of increased "non-product" costs, and certain "modifications" of the rules governing the equal application of increased product costs, and the recoupment of unrecovered increased product costs. *Id.* at 32718-24.

With respect to the equal application requirement, the agency stated that the Regulations "generally require equal application of increased product costs to the May 15, 1973 prices of each product among all classes of purchaser of that product", and that "[t]his results in a maintenance of the May 15, 1973 price differentials among classes of purchaser of each product from a refiner." *Id.* at 35722. The agency then noted its recent amendment to the cost bank rule, which

> clarified . . . the equal application [requirement] . . . to make clear that, to the extent that there is unequal application of . . . increased product costs in prices actually charged, the difference between the largest amount of increased product cost actually applied to the price charged to any class of purchaser of a product and any lesser amount applied to the price charged to another class of purchaser may not be recouped in a subsequent month, except to the extent that a higher price could not be charged because of a pre-existing written contract.

Id. The agency continued by expressing its "aware[ness] that the equal application requirement "is responsible for an inflexibility in the price regulations which becomes more troublesome and causes more dislocations in the market as supplies of petroleum products increase and there is greater need for the price mechanism to begin to play its customary role in the market." *Id.* at 32722-23.

One of the "principal problem area[s]" caused by the rule's inflexibility, the agency reported, revolved around the nationwide marketing practices of some refiners, on the one hand, and the regional practices of other, independent marketers, on the other hand:

> A refiner marketing on a national basis is required . . . to add an equal increment to its May 15, 1973 prices for

> gasoline throughout the country. It may, however, be competing with regional marketers in one area that have prices on the average that are above its prices, while in another region, the regional marketers may have lower prices. The equal application requirement, in such circumstances, runs counter to the interests of independent regional marketers whose prices are higher than the national refiner's prices, since the national refiner would tend to expand its market at the expense of the higher-priced independent regional refiner in those circumstances.
>
> In effect, a nationwide refiner is unable to adjust its prices on a regional basis and must, as a practical matter, choose an increment of increased product cost to add to its May 15, 1973 prices which results in selling prices that are too high to be competitive in some markets and are too low in other markets.

Id. at 32723. The agency then explained the dilemma posed by this state of affairs:

> [A]ny relaxation of [the] equal application requirements on an area or regional basis could result in disproportionate pass-through of increased product costs in different regions of the country. On the other hand, there has traditionally been regional price flexibility which serves, among other things, to even out supply among various regions.

Id. As a proposed solution, the agency stated that it intended to "modify" the equal application rule so that it would "apply to all classes of purchaser of a product within the same recognized market area", and would "limit the largest increment of increased product costs which [could] be applied to the price of a product to an amount of increased product costs applied to that product in any other region." *Id.* This modification, the agency explained, would both "help protect the independent sector of the market" and "avoid the possibility of undue regional price disparities." *Id.* The agency then requested comments on whether the limitation on regional price flexibility was necessary, and, if so, whether the suggested ten percent limitation was appropriate. *Id.*

In addition to the problem attending the nation-wide marketing practices of certain refiners, the agency further indicated that an inflexibility inherent in the equal application requirement posed problems at the regional, as well as national, level. *Id.* Two examples were specifically cited by the agency in this regard. The first problem concerned a price disparity resulting from the Regulations' restrictions upon the recovery of increased "non-product" costs:

> [By] applying the same increment of increased product cost to diesel fuel sold at retail as is applied to diesel fuel sold through independent marketers (who have been permitted certain increased non-product cost related price increases), a refiner is very likely to be selling diesel fuel at refiner-owned and operated retail outlets at a lower price than the independent marketer, because the same non-product cost related price increases cannot be implemented by a refiner unless it prenotifies and becomes subject to profit margin limitations.

Id. The agency then made an apparent reference to the purpose of the three-cent rule: "A special provision was added to the refiner's cost allocation formula to take this problem into account in sales of gasoline, but the problem remains as to other products." *Id.* The second problem mentioned by the agency centered upon the recovery of increased "product" costs and the situation of particular classes of purchaser:

> [A] refiner's ability to implement price increases which take into account the ability of a class of purchaser to absorb an increase, or to reflect the fact that a class of purchaser was paying atypically low prices on May 15, 1973, is restricted. Thus, for example, a petrochemical plant or other industrial user of propane may have a May 15, 1973 price for the product that is 3¢ per gallon less than the May 15, 1973 price to wholesale distributors of propane for residential use. Current price regulations preclude an increase in the amount of increased product cost applied to propane sold for industrial use unless an equal increment is applied to the propane sold for residential use.

Id. Given these problems, the agency proposed

> "to amend the equal application requirement so that different amounts of increased product costs may be added to the prices charged to different classes of purchaser of a product, provided that the amount added to the prices charged to any class of purchaser that includes independent marketers cannot be greater than the amount added to the prices charged to any other class of purchaser of the same product, except to the extent that a refiner is selling to a particular purchaser at a lower price under a preexisting written contract."

Id. The agency explained that it proposed to modify, rather than eliminate, the equal application requirement because the rule "serves to protect the independent sector of the market." *Id.* Finally, the agency requested comments as to whether the amendment would offer sufficient protection to the independent sector, and as to whether other limitations on the application of increased product costs would be required. *Id.*

With respect to the rules concerning the banking of increased product costs, the agency proposed to limit the total amount of increased product costs that could be passed through in any month. *See id.* at 32723-24. The reason for this "modification," the agency stated, was that increased supplies were prompting refiners to sell products at prices reflecting less than a full pass-through of increased product costs and to increase their banks of increased product costs. *Id.* at 32723. In the event that a shortage situation should occur, the agency explained, there could be marked price increases, because "the maximum lawful prices which refiners could charge under current regulations would include a full pass-through in a single month of all banked costs accumulated over all of the proceeding [sic] months." *Id.* The agency believed that a limitation on the size of a refiner's bank would be an appropriate response to this state of affairs.

Following its discussion of the amendments, the agency invited public comments on the proposals, as well as "on aspects of the price regulations which have not specifically been addressed in this notice . . ." *Id.* at 32725. The agency requested that all

comments be received by September 27, 1974, and designated September 30 and October 1, 1974 as hearing dates for the receipt of oral comments concerning the amendments. *Id.*

As published on September 10, 1974, the proposed modification of the equal application requirement appeared as an amendment to the rule governing the refiner's cost allocation computations for increased "product" costs:

§ 212.83. Allocation of refiner's increased costs.

* * * * *

(c) *Allocation of increased costs—*

(1) *General rule*—(i) *Increased product costs.* In computing base prices for a covered product, a refiner may increase its May 15, 1973 selling price to each class of purchaser each month beginning with November 1973 by an amount to reflect the increased product costs attributable to sales of covered products using the differential between the month of measurement and the month of May, 1973, provided that the amount of increased costs used in computing a base price is calculated by use of the general formula . . . and provided that the amount of increased product costs included in computing base prices of a particular covered product must be equally applied to each class of purchaser. In apportioning any amount of increased product costs to covered products, a refiner may apportion the total amount of increased product costs to a particular covered product in whatever amount it deems appropriate.

(ii) *Increased non-product costs.* In computing allowable prices in excess of base prices for a covered product, a refiner may increase its price above base price to each class of purchaser each month beginning with October 1974 by an amount to reflect the increased nonproduct costs attributable to sales of covered products in the month of measurement, using the differential between the month of measurement and the

month of May, 1973, provided that . . . the amount of increased non-product costs included in computing allowable prices above base price of a particular covered product must be equally applied to each class of purchaser. In apportioning any amount of increased non-product costs to covered products, a refiner may apportion the total amount of increased non-product costs to a particular covered product in whatever amount it deems appropriate.

(iii) *Exceptions to equal application rule.* Notwithstanding the provisions of paragraphs (c)(1)(i) and (ii) above, a refiner may comply with the provisions of this paragraph by applying increased costs equally among classes of purchaser within recognized marketing areas, and need not apply increased costs equally among classes of purchaser in different marketing areas, provided that the largest amount of increased product cost applied to the May 15, 1973 selling price of any product in any marketing area shall not exceed by more than 10 percent the amount of increased product cost applied to the May 15, 1973 selling price of that product in any other marketing area; and, further, a refiner may comply with the provisions of this paragraph within any particular marketing area by applying unequal amounts of increased costs among classes of purchaser of a product, provided that no greater amount of increased costs is applied to the May 15, 1973 selling price of any product in sales to any class of purchaser which includes an independent marketer . . ., than is applied to the May 15, 1973 selling price of that product in sales to all other classes of purchaser in that marketing area.

Id. at 32727. The cost bank rule was published in a proposed form without a deemed recovery feature:

§ 212.83. *Allocation of refiner's increased costs.*

* * * * *

(d) Carryover of costs. (1) If, in any month beginning with October 1973, and ending with September 1974, a firm charges prices for covered products which result in the recoupment of more or less total revenues than the entire amount of increased product costs calculated pursuant to the general formula and allowable under paragraph (c)(1)(ii) of this section, the excess revenues recouped must be subtracted from the May 15, 1973 selling prices and the amount of increased product costs not recouped may be added to May 15, 1973 selling prices to compute the base prices for covered products in the subsequent month provided that the amount of the increased product cost not recouped and included in computing the base prices of a particular covered product must be equally applied to each class of purchaser. (2) If, in any month beginning with October 1974, a firm charges prices for covered products which result in the recoupment of more total revenues than the entire amount of increased product costs calculated pursuant to the general formula and allowable under paragraph (c)(1)(ii) of this section, the excess revenues recouped must be subtracted from the May 15, 1973 selling prices to compute base prices for covered products in the subsequent month. If, in any month beginning with October 1974, a firm charges prices for covered products which result in the recoupment of less total revenues than the amount of increased product costs calculated pursuant to the general formula, only the amount of increased product costs not recouped because of lesser sales volumes than were estimated for the current month may be added to the May 15, 1973 selling prices to compute prices for covered products in the subsequent month.

Id. at 32728-29.

Subsequent to the September 10, 1974 notice, the agency in fact received oral and written comments regarding revisions of

the Regulations. Thereafter, on December 5, 1974, the agency published several final amendments to the Regulations concerning the pass-through of increased "non-product" costs, effective December 1, 1974. *See* 39 Fed. Reg. 42368 (December 5, 1974). With respect to "all other revisions to the price regulations proposed in the September 10 notice," the agency stated that it was deferring action "until a later date," while keeping the matters "under active consideration." *Id.* In this regard, the agency, without any discussion in the preamble, published as a final amendment a cost bank rule, applicable to increased "product" costs, with a deemed recovery component:

> § 212.83. *Allocation of refiner's increased costs.*
>
> * * * * *
>
> (e) *Carryover of costs.* (1) If in any month beginning with October 1973, a firm charges prices for a special product which result in the recoupment of less total revenues than the entire amount of increased product costs calculated for that product pursuant to the general formula and allowable under paragraph (c)(1)(i) of this section and that unused amount of increased costs is not used to increase May 15, 1973 selling prices pursuant to paragraph (c)(1)(ii) of this section, the amount of increased product cost not recouped may be added to the May 15, 1973 selling prices to compute the base prices for that special product for a subsequent month . . . . With respect to each special product, . . . when a firm calculates the amount of increased product cost not recouped, which may be added to the May 15, 1973 selling prices to compute the base prices for that special product in a subsequent month, it shall calculate its revenues as though the greatest amount of increased product costs actually added to any May 15, 1973 selling price of that special [prod]uct and included in the price charged to any class of purchaser, had been added, in the same amount, to the May 15, 1973 selling price of that special [prod]uct and

> included in the price charged to each class of purchaser; except that, where an equal amount of increased product cost is not included in the price charged to a purchaser because of a price term of a written contract covering the sale of such product, which was entered into on or before September 1, 1974, that portion of the increased product costs not included in the price charged to such a purchaser need not be included in the calculation of revenues. If in any month beginning with October 1973, a firm charges prices for a special product which result in the recoupment of more total revenues than the entire amount of increased product costs calculated for that product pursuant to the general formula and allowable under paragraph (c)(1)(i) of [this] section, the amount of excess product costs recouped must be subtracted from the May 15, 1973 selling prices to compute the base prices for that special product for the subsequent month.

10 C.F.R. § 212.83(e)(1), 39 Fed. Reg. at 42372 (December 5, 1974).

Additional final amendments were published on December 24, 1974. 39 Fed. Reg. 44407, on January 16, 1975, 40 Fed. Reg. 2795, and on August 29, 1975, 40 Fed. Reg. 39850. As with the December 5, 1974 changes, the amendments addressed matters unrelated to the equal application and deemed recovery rules pertaining to motor gasoline. Moreover, the agency continued to defer formal consideration of the revisions proposed in the September 10 notice of proposed rulemaking.

On October 22, 1975, the agency issued a notice of proposed rulemaking on the question of whether the Regulations should, *inter alia*, "permit limited regional pricing by refiners, resellers, and retailers." 40 Fed. Reg. 49372 (October 22, 1975). In the notice, the agency first explained that the amendment as proposed on September 10, 1974, to allow regional exceptions from the equal application requirement had not been adopted because of fears that the changes might result in higher prices, especially for

home heating oil, and because of perceived administrative problems in implementing the changes. *Id.* The agency, however, stated that it "continue[d] to be of the view that at least a limited amount of regional pricing flexibility should be permitted, as an essential step toward reducing the rigidity of the pricing regulation . . . ." *Id.* The agency then proposed to issue a regional price rule that would allow a differential among regions of up to two cents per gallon in the amount of costs used to determine the selling price of covered products and requested comments on whether the differential was an appropriate amount. *Id.* at 49372-73. In addition, the agency proposed to allow "regional price flexibility on a product-by-product basis," thus permitting flexibility for gasoline, for example, but not for certain oils. *Id.* at 49373. With respect to both proposals, the principal issue confronted by the agency, it appears, concerned "the definition of the 'region' within which equal application of increased costs will continue to be required." *Id.* The agency hence specifically requested comments on the definition of "region," as well as on the general matter of regional pricing. *Id.* Meanwhile, the proposed rule read:

§ 212.83. *Allocation of refiner's increased costs.*

* * * * *

(c) *Allocation of increased product costs*—(1) *General rule*—(i) *No. 2 oils and gasoline.* In computing base prices for sales of No. 2 oils and gasoline, a refiner may increase its May 15, 1973 selling price to each class of purchaser each calendar month beginning with November 1973 by an amount to reflect the increased product costs attributable to sales of that covered product using the differential between the month of measurement and the month of May, 1973, provided that the amount of increased costs used in computing a base price is

calculated by use of the formula set forth in paragraph (c)(2)(i) of this section, and that the formula of paragraph (c)(2)(i) of this section is computed separately for No. 2 oils and for gasoline, and that the amount of increased product costs included in computing base prices of No. 2 oils and of gasoline is equally applied to each class of purchaser.

* * * * *

(v) *Regional pricing exemption to the equal application rule.* A refiner may comply with the provisions of § 212.83(c)(1). . . as to No. 2 oils, gasoline, and each particular general refinery product by applying increased costs equally among classes of purchaser of each product within each region, and need not apply increased product costs equally among classes of purchaser of each product in different regions provided that the largest amount of increased product cost applied to the May 15, 1973 selling price of any product in any region shall not exceed by more than two cents per gallon the amount of increased product cost applied to the May 15, 1973 selling price of that product in any other region.

Id. at 49374-75.

Following subsequent public hearings and comments on this issue of regional price flexibility, the agency on July 21, 1976, published a final rule amending 10 C.F.R. § 212.83(h):

(h) *Equal application among classes of purchaser—*

(1) *General rule.* Except as provided in subparagrap[h] (2) of this paragraph, when a firm calculates the amount of increased costs not recouped that may be added to May 15, 1973, selling prices to compute maximum allowable prices in a subsequent month, it shall calculate its revenues as though the greatest amount of increased costs actually

added to any May 15, 1973 selling price of the product concerned and included in the price charged to any class of purchaser, had been added, in the same amount, to the May 15, 1973, selling prices of that product and included in the price charged to each class of purchaser.

(2) *Special rule.*—(i) *Gasoline.* When a firm calculates the amount of increased costs not recouped that may be added to May 15, 1973, selling prices of gasoline to compute maximum allowable prices in a subsequent month, it may, notwithstanding the general rule in subparagraph (1) above, compute revenues as though (A) the greatest amount of increased costs actually added to any May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser in a particular region (as defined in 212.82), had been added, in the same amount, to the May 15, 1973, selling prices of that product and included in the price charged to each class of purchaser in that region, and (B) the greatest amount of increased costs actually added to the May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser in any region had been added, in the same amount (less any actual differential or three cents per gallon, whichever is less) to the May 15, 1973, selling prices of that product and included in the price charged to any class of purchaser in any other region.

(3) *Exceptions.* (i) Where an equal amount of increased costs is not included in the price charged to a purchaser because of a price term of a written contract covering the sale of the product concerned that was entered into on or before September 1, 1974, that portion of the increased costs not included in the price charged to that purchaser need not be included in the calculation of revenues as otherwise required by subparagraph (1) or (2) above.

41 Fed. Reg. 30024-25 (July 21, 1976). As the agency explained, the former equal application rule had been interpreted as preventing the "banking" of costs where a refiner had engaged in unequal intra- and inter-class pricing. *Id.* at 30021. Such an interpretation, according to the agency, had "resulted in selling prices which are either too high or too low to be competitive in many instances,

where a refiner marketing on a national basis is in competition with regional local marketers." *Id.* The new amendment would modify this rule to permit, without a deemed recovery "penalty," the unequal application of increased costs among regions defined by PAD (Petroleum Administration Defense) districts:

> [A] refiner marketing on a national basis, or one marketing in more than one PAD district, may, without penalty as to the carry-forward of unrecouped costs . . ., pass through increased costs to a class of purchaser of gasoline located in one PAD district in amounts which exceed by not more than 3 cents per gallon the amount of increased costs passed through to any class of purchaser of gasoline located in any other PAD district.

Id. See id. at 30023. Moreover, the agency noted that "[b]ecause the members of classes of purchasers are not necessarily confined to a single PAD district," refiners would be able to charge varying prices within a class, so long as the prices were not violative of the "normal business practice" policy of 10 C.F.R. § 210.62(b). *Id.* Hence, the agency observed, "the '3-cent rule' adopted today applies with respect to intra-class price variations, as well as to price variations between classes of purchaser, which are instituted pursuant to today's amendments." *Id.*

On January 27, 1977, the agency published various amendments affecting the pricing of gasoline. One change modified the definition of "d_i^u", altering it from a cents per gallon figure to a total dollar amount of increased costs that a refiner could recover through sales:

> § 212.83. Price Rule
>
> * * * * *
>
> (c) *Allocation of increased costs.*
>
> * * * * *
>
> d_i^u = The total dollar amount a refiner may apportion in the period "u" to . . . gasoline. . . .

10 C.F.R. § 213.83(c)(2). *See* 42 Fed. Reg. 5030, 5031 (January 27, 1977). Conspicuously absent from this amendment was the "three cent" retail price equalization rule, which had been an express feature of the former rule.

On May 5, 1977, the agency issued a "corrective amendment" to the Price Rule:

§ 212.83 Price Rule

* * * * *

(h) *Equal Application among classes of purchaser* * * *

(2) *Special Rules* * *

(iv) *Retail sales of gasoline by refiners.* When a refiner calculates the amount of increased costs not recouped that may be added to May 15, 1973, selling prices of gasoline to compute maximum allowable prices in a subsequent month, it may, notwithstanding the general rule in paragraph (b)(1) of this section, compute revenues as though (A) the greatest amount of increased costs actually added to any May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser that purchases gasoline at retail from a refiner at any service station operated by employees of the refiner had been added to the May 15, 1973, selling prices of that product and included in the price charged to each class of purchaser that purchases gasoline at retail from a refiner at any service station operated by employees of the refiner and (B) the greatest amount of increased costs actually added to the May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser that purchases gasoline at retail from a refiner at any service station operated by employees of the refiner had been added, in the same amount (less any actual differential or three cents per gallon, whichever is less) to the May 15, 1973 selling prices of gasoline and included in the price charged to all other classes of purchaser.

10 C.F.R. § 212.83(h)(2)(iv), 42 Fed. Reg. 22882 (May 5, 1977). In its discussion of the changed rule, the agency stated that the amendment "merely replaces a provision inadvertently omitted" in January, 1977, that had been "previously found in the definition of 'd_i^u' " and that "permits a refiner to add three cents more of increased costs to the prices of gasoline sold at retail by employees of the refiner than that refiner adds to the prices of gasoline sold at other levels of distribution." *Id.* at 22881. Moreover, the agency explained that the amendment served to clarify the equal application and deemed recovery requirements:

> This amendment makes explicit the requirement that the equal application rule continues to apply to sales of gasoline at retail by a refiner, that is, that recovery of increased costs by refiners is computed as though the greatest amount of increased costs included in the selling price to any class of purchaser that purchases gasoline at retail from a refiner had been included in the selling price to all such classes of purchaser. This requirement was implicit in the earlier definition of "d_i^u" and does not represent a change from the earlier provision.

Id. As for the placement of the amendment, the agency stated that the provision "more appropriately appertains to the topic of § 212.83(h)," and that "reinsertion" in § 212.83(c)(2) would be "awkward." *Id.* The agency noted further that "no substantive change is involved or intended by this change in placement," and indicated that because the amendment was "only to correct an inadvertent omission," "good cause" existed to issue the amendment without notice and opportunity for comment. *Id.* Finally, the agency asserted that the amendment "merely restores the regulations to their previous status, and is not intended to change their effect." *Id.*

In January, 1979, Mobil commenced the instant action, contesting the validity of the "new" three cent rule, as published on May 5, 1977, and, alternatively, the validity of the equal application rule with the deemed recovery component, as published on September 5, 1974. In the ensuing months, Exxon, Gulf, and Marathon joined as plaintiff-intervenors.

Subsequently, the agency expressed an opinion that the equal application requirement posed certain problems in the context of "banking": "The . . . rule . . . in some instances may cause certain refiners . . . to maintain a selling price in retail sales of gasoline well below those of independent retailers and well below those that would prevail in a competitive marketplace." 44 Fed. Reg. 54902 (September 21, 1979). To meet this problem, the agency proposed to amend § 212.83(h) to permit refiners to increase from 3 cents to 7.9 cents the maximum cents per gallon differential. *Id.* at 54902, 54905-06.

On April 29, 1980, the agency published an amendment to § 212.83(h), raising the cents per gallon differential to 8.6 cents. 45 Fed. Reg. at 28303-04 (April 29, 1980). At this time, the agency observed again that "the equal application rule is causing refiners to sell gasoline in retail sales at prices substantially below those of independent retailers and those that exist in the current competitive marketplace," thus creating "serious competitive imbalances in current retail markets." *Id.* at 28303. In this regard, the agency reported that refiners had indicated in comments concerning the amendment that they "may not be able to take full advantage of the [new rule] since within the retail sales category they would still be deemed to recoup any increase in one retail sale on all other retail sales." *Id.* at 28302. The agency then expressed its intent to issue a notice of proposed rulemaking "regarding further amendments to the equal application rule." *Id.* at 28303.

In June, 1980, the agency instituted rulemaking proceedings in regard to a proposal to eliminate the equal application rule. 45 Fed. Reg. 44238 (June 30, 1980). In the notice, the agency remarked that the rule had protected various classes of purchaser by requiring that increased costs "be allocated equally to each class of purchaser and within each class of purchaser," and that the rule had helped "to maintain the historical differentials in prices between and among classes of purchasers in order to ensure that petroleum products are distributed at equitable prices." *Id.* at 44239. Nonetheless, the agency stated that it was considering

modifying or eliminating the rule "in light of current needs and requirements," "because, while maintaining historical differentials ensures equitable prices for a certain period of time, at some point a change in society, the economy, and the petroleum market could make the historical differentials inequitable and anomalous." *Id.* Additionally, the agency noted that an equal application rule for refiners seemed to be "an anomaly," particularly at the retail level, inasmuch as changes in certain price rules had resulted in the effective elimination of an equal application rule applicable to retailers and to most resellers and reseller-retailers. *Id.* Moreover, the agency indicated that because "the equal application rule tends to discourage the imposition of significant price differentials among similarly situated customers and therefore may reduce the pricing flexibility of those subject to it," and because it was contemplated that gasoline would be decontrolled "as soon as market conditions allow," "modifications to or elimination of the equal application rule" were being considered as possible means of "introduc[ing] a greater degree of pricing flexibility and market competition." *Id.* In this regard, the agency remarked that "[i]n a regime of full scale and pervasive controls, . . . a reduction in pricing flexibility may be justified, because the conditions that make pervasive controls necessary suggest that free market competition is inadequate to allocate products equitably at equitable prices." *Id.* The agency "conclu[ded]", however, that "at this time and given the current and projected petroleum stocks, and decreased demand, allocation of increased costs by market forces will result in equitable pricing, while at the same time furthering the EPAA objective of minimizing unnecessary interference with market mechanisms." *Id.*

The agency went on to propose, first, an amendment of the equal application rule, with its deemed recovery feature, that would exempt retail sales of gasoline from the rule. *See id.* at 44239, 44241 and 44243. Such an amendment, the agency explained, "would not increase the total amount of allowable increased costs that could be passed through," inasmuch as costs assessed at retail would "result in a reduction in the allowable

increased costs available for use at other marketing levels or in the firm's banks." *Id.* at 44239, 44243. Also, the agency stated, the amendment "would permit refiners . . . to allocate their increased costs in a different and more flexible manner," *id.* at 44239, 44243, and would remove a "regulatory-induced incentive for refiners . . . to undercut their independent competition," *id.* at 44240. Anti-trust laws, or other legislation, the agency asserted, would deal with any predatory pricing practices that could adversely impact the independent sector. *Id.* at 44240. As an alternative to this proposed amendment, the agency suggested (1) the total elimination of the equal application rule at both wholesale and retail levels; (2) the elimination of the equal application rule at the retail level, only to the extent that the amount of increased costs added to retail selling prices of gasoline is equal to or greater than the weighted average amount of increased costs added to selling prices of gasoline at wholesale or (3) the elimination of the equal application rule at both wholesale and retail levels, only to the extent that the amount of increased costs added to retail selling prices of gasoline is equal to or greater than the weighted average amount of increased costs added to selling prices of gasoline at wholesale. *Id.* at 44240, 44241-43.

Following public hearings on the matter, the agency, on November 5, 1980, adopted a final rule deleting the equal application rule with respect to all sales of gasoline. 45 Fed. Reg. 72626 (November 3, 1980). In its published form, the new rule provided:

> § 212.83. Price rule
>
> * * * * *
>
> (h) *Equal application among classes of purchaser.*
>
> (2) *Special rules.*—(i) *Gasoline.* All sales of gasoline are exempt from the provisions of this paragraph.

10 C.F.R. § 212.83(h)(2)(i), 45 Fed. Reg. at 72630. In discussing the change, the agency stated that the equal application rule had "created a disincentive for refiners to increase any retail sale

price unless every retail price could be raised," because the deemed recovery rule applied within a class of purchaser as well as between classes of purchaser." *Id.* at 72627. The agency observed also that deletion of the rule would afford refiners "the pricing flexibility to recoup increased costs allocated to gasoline as they deem appropriate"; would "foste[r] competition in the marketplace generally, minimiz[e] regulatory interference with market mechanisms and promot[e] economic efficiency"; and would, "in the long run," benefit the consumer as well as the industry. *Id.* at 72628. The agency emphasized, however, that in eliminating the rule, it was "specifically reject[ing] suggestions made by some refiners that the equal application rule was always inappropriate." *Id.* On this point, the agency stated: "DOE continues to believe that maintenance of historical price differentials in the pass-through of increased costs is in a supply shortage the most appropriate means, if not the *only* means, of ensuring equitable pricing, a specific purpose of the EPAA." *Id.* Additionally, the agency expressed its belief that "the adequate supply environment and the competitive marketplace will provide the primary safeguard against anticompetitive pricing by refiners," noting that comments of the Antitrust Division of the Department of Justice had supported the elimination of the equal application rule. *Id.* Finally, the agency observed that in the notice of proposed rulemaking,

> we suggested that it was our tentative belief that the equal application rule created a regulatory inducement for refiners both to undersell independent competitors in certain situations and not to reduce prices to marketers to meet price competition in other situations, and that this inducement could have serious long-term effects on the independent sector of the industry.

Id. at 72628-29. Upon consideration of the rulemaking record, however, the agency stated that it had determined that there was "n[o] . . . support" in the record for the conclusion that the equal application rule harmed the independent sector, and thus rejected its tentative belief as "unfounded." *Id.* at 72629. In emphasizing

that its deletion of the equal application rule was "not based on any determination that such elimination is necessary to aid the independent sector of the market," the agency explained that, as noted by both independent marketers and refiners, and by the DOE Office of Special Counsel, "most of the current petroleum product price disparities can be attributed to the crude oil cost disparities between refiners, not the equal application rule." *Id.* at 72629.

After all this regulatory activity, on January 30, 1981, President Reagan published Executive Order No. 12287, which abolished the Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212. 46 Fed. Reg. 9909 (January 30, 1981).

II.

Before addressing the merits of the parties' motions, it is necessary to come to terms with a point of dispute among the parties concerning the subject matter of this lawsuit.

The plaintiffs contend that the controversy before the Court centers upon the nature and scope of the May 5, 1977, three cent rule, because prior to May 5, 1977, recoveries under the original three cent rule that were passed through in actual selling prices below base prices had been exempt from any equal application penalty. On this point, the plaintiffs seek a declaration that the original three cent rule permitted refiners to apply, without penalty, unequal increased cost increments to actual motor gasoline prices below base prices charged to firms in the class of refiner-operated stations; that the September 5, 1974, deemed recovery rule was not applicable to recoveries from refiner-operated stations under the three cent rule; and that the May 5, 1977 three cent rule was unlawfully promulgated. Alternatively, if this Court were to declare the May 5, 1977 three cent rule to be valid, the plaintiffs seek a declaration that the September 5, 1974 deemed recovery rule was procedurally and substantively invalid.

The defendants, on the other hand, argue that the plaintiffs' grievance is with the requirement that the unequal application of increased product costs in actual sale prices below base prices of

motor gasoline through refiner-operated stations falls within the reach of a deemed recovery rule. If such a requirement existed prior to the January 27, 1977, deletion of the three cent rule, then the May 5, 1977 three cent rule, the defendants argue, would be procedurally valid under the interpretive rule exception to rule-making requirements, irrespective of where the "new" rule was positioned in the Regulations. If there were no preexisting requirement, the defendants accept the plaintiffs' contention that reinsertion of the May 5, 1977, three cent rule as part of the deemed recovery rule was procedurally deficient. In this regard, the defendants assert that beginning with the September 5, 1974, deemed recovery rule, all recoveries under the three cent rule were subject to a cost recovery penalty. Accordingly, the defendants seek a declaration that the September 5, 1974, equal application rule, with its deemed recovery component, was procedurally and substantively valid.

The disagreement among the parties stems, in part, from the agency's statement in the May 5, 1977, preamble that the equal application and deemed recovery rules "[were] implicit in the earlier definition of 'd_i^u'." 42 Fed. Reg. at 22881 (May 5, 1977). The plaintiffs have construed this language as meaning that the April 4, 1974 three cent rule contained an equal application requirement, with a deemed recovery component, which pertained to actual sale prices at refiner-operated stations. The defendants, however, argue that it was the promulgation of the September 5, 1974 rule that brought the unequal application of costs in actual sales to the group of refiner-operated stations within the scope of a deemed recovery penalty; that no regulation in effect in April, 1974, expressly addressed the issue of whether refiners could unequally apply the three cent differential in actual selling prices below base prices, and, if so, whether refiners could do so between individual stations; and that the cited language in the May 5, 1977 preamble referred to the April, 1974 definition of "d_i^u" as implicitly modified by the September 5, 1974 rule.

Despite this difference of opinion, both parties appear to accept the proposition that the procedural validity of the May 5, 1977

three cent rule turns upon the agency's assertion that the rule did not effect a substantive change in the Regulations. Given this common ground, in order to determine whether a substantive change in fact occurred, it is useful to consider the scope and effect of both the original three cent rule and the September 5, 1974 equal application rule, with its deemed recovery component.

At this juncture, the defendants raise the objection that the plaintiffs' action is barred by the doctrine of laches. Inasmuch as the focus of this action is upon the May 5, 1977 three cent rule, and in view of the relatively brief period of time between the issuance of the rule and the commencement of this action, and the plaintiffs' efforts to seek clarification of the rule prior to filing suit, this Court is not inclined to dismiss this action on the ground of laches.

A.

In support of their contention that the original three cent rule gave refiners flexibility in passing-through increased product costs in actual retail prices at refiner-operated stations, the plaintiffs assert that the rule only pertained to the computation of base prices and not to the computation of actual prices below base prices; that the rule did not require refiners to charge uniform base prices or uniform selling prices below base prices; that the rule permitted refiners to pass-through unequal increased product cost increments in retail sales; that no deemed cost recovery penalty inhered in the original rule; and that an equal application requirement or a deemed recovery penalty affecting actual selling prices at refiner-operated stations would be inconsistent with the purpose of the original three-cent rule, which was to equalize prices between independents and refiners according to individual market conditions.

The defendants share the plaintiffs' views that the original rule concerned base prices, and that the rule set forth no explicit requirement that refiners charge equal increments of increased product costs where selling prices were below base prices, or else

be subject to a cost recovery penalty. The defendants argue further, however, that the original three cent rule sanctioned unequal increased product cost increments in base prices only as between retail purchasers of gasoline at refiner-operated stations and all other sales, and disallowed unequal increased product cost increments in base prices among retail purchasers at refiner-operated stations.

Examining the language of the original three cent rule, the general provision provides that a refiner "may" apply "the" dollar increase, or d_i^u increment to the May 15, 1974 selling price of motor gasoline "to each class" to determine the base price "to each class." The exception to this general provision provides that "the" dollar increase that a refiner "may" apply to the May 15, 1973 selling price of motor gasoline to determine "the base prices to the classes" of retail purchasers at refiner-operated stations "may" be d_i^u plus three cents per gallon, so long as a refiner deducts from the formula used to arrive at the d_i^u increment a sum represented by "the actual amount of cents per gallon increase added to d_i^u. . . multiplied by the estimated number of gallons . . . to be sold" during the relevant time period at retail at refiner-operated stations.

Several conclusions may be drawn from this language. For example, as all parties recognize, the rule refers only to the computation of base prices, not to the computation of actual selling prices below base prices. Moreover, the usage of the word "may" in both the general provision and the exception suggest that a refiner could exercise its discretion in determining the amount of increased product costs to pass-through in calculating base prices. In this regard, the Temporary Emergency Court of Appeals [TECA] has indicated that under the base price rules, a refiner was not required to add *all* increased product costs arrived at under the general formula in determining base prices; that a refiner could vary its base prices according to the amount of increased product costs applied to May 15, 1973 selling prices; and that the sum represented by adding all increased product costs calculated under the formula to the May 15, 1973 selling price was

the maximum allowable base price, rather than the only base price. *See Standard Oil Company* v. *DOE*, 596 F.2d 1029, 1040-45 (TECA 1978). This decision of TECA appears to dispose of any claim that under the general provision, the same increased product cost increment had to be applied in determining base prices to various classes. As for the exception, it appears that a refiner was also not required to apply equal increased product cost increments to retail prices at refiner-operated stations. Certainly the permissive nature of the rule, which allowed a refiner to pass through "a maximum" of three cents per gallon, implies that no uniform increment was required to be imposed. The preamble conveys a similar impression. *See* 39 Fed. Reg. at 12013 (April 2, 1974). More importantly, the language of the exception seems to paraphrase and relate back to the language of the general provision, indicating that, within the three cents per gallon limitation, the pass-through of increased product costs among refiner-operated stations is left to the refiners' discretion. Because the agency's contrary positions, *see, e.g.*, Interp. 78-53 [Mobil Oil Corp.], 43 Fed. Reg. 40207 (September 11, 1978); Interp. 78-36 [Atlantic Richfield Co.], Eng. Man. (CCH) ¶ 56,427, at 56,583-84 (July 10, 1978); Interp. 75-5 [Phillips Petroleum Co.], Eng. Man. (CCH), ¶ 56,246, at 56,266 (February 14, 1975), *aff'd*, 2 FEA ¶ 80,599 (May 30, 1975); 39 Fed. Reg. at 32722, 32723 (September 10, 1974); 39 Fed. Reg. at 32307 (September 5, 1974), cannot be reasonably harmonized with the language of the original three cent rule, they are entitled to little weight. *See, e.g., United States* v. *Larionoff*, 431 U.S. 864, 872-73 (1977); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Pennzoil Co.* v. *DOE*, F.2d , slip opinion, at 35 n. 27 (TECA April 6, 1982); *Wiggins Brothers Inc.* v. *DOE*, 667 F.2d 77, 88 (TECA 1981), *cert. denied*, 102 S.Ct. 1749 (1982); *Koch Refining Co.* v. *DOE*, 658 F.2d 799, 803 (TECA 1981); *UPG, Inc.* v. *Edwards*, 647 F.2d 147, 156-58 (TECA 1981); *Standard Oil Co. v. DOE*, 596 F.2d at 1055-56; *Perine* v. *Williams Norton & Co.*, 509 F.2d 114, 120 (2d Cir. 1974). The Court shall now examine the September 5,

1974 equal application rule in light of this construction of the original three cent rule.

B.

In their challenge to the operation of the September 5, 1974 rule, the plaintiffs assert that the actual dollar amount of costs recovered under the three cent rule would be subtracted from the amount of increased product costs otherwise available for recovery, such that it was the d_i^u increment, and not the three cent rule allowance, that would be equally applied under the September 5, 1974 rule. Additionally, the plaintiffs contend that, in any event, the September 5, 1974 equal application rule, with the deemed recovery component, was procedurally and substantively invalid. With respect to this latter issue, the plaintiffs argue that the defendants are collaterally estopped by the decision in *Lakes Gas Co.* v. *DOE*, 477 F. Supp. 187 (D. Minn. 1979), *reaffirmed in Western Petroleum Co.* v. *DOE*, F. Supp. , CV 3-80-626 (D. Minn. March 20, 1981), from relitigating the procedural validity of the rule. Because of the defendants' representations concerning the presentation of this issue to the *Lakes Gas* Court, this Court shall decline to apply the doctrine of offensive collateral estoppel.

In response to the plaintiffs' arguments, the defendants assert that the September 5, 1974 rule, by its own terms, applied to recoveries of *all* increased product costs passed through in actual selling prices below base prices. As for the lawfulness of the rule, the defendants contend that the rule was procedurally valid under the "good cause" exception to the requirement of rulemaking proceedings, and that the rule was substantively valid under the EPAA.

It is true, as asserted by the defendants, that insofar as the September 5, 1974 rule referred to "increased product costs," it did not expressly exempt recoveries under the original three cent rule. There is also some merit, however, to the plaintiffs' position that the September 5, 1974 rule did not affect recoveries under the three cent rule, to the extent that under the terms of the

original three cent rule, such recoveries were not included in the final d_i^u amount of increased product costs.

Because this Court must conclude that the September 5, 1974 rule was procedurally invalid, it becomes unnecessary to resolve this dispute over the operation of the agency's formula for the calculation of increased product costs.

Both Section 4 of the APA, 5 U.S.C. § 553(b)(B), and Section 7 of the Federal Energy Administration Act [FEAA], 15 U.S.C. § 766(i)(B)(1974), *repealed*, Department of Energy Organization Act, § 709 (1977), permitted the agency to promulgate a regulation without prior notice and comment where good cause existed. Section 5 of the APA provides that the requirement of prior notice does not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 15 U.S.C. § 553(b)(B). Section 7 of the FEAA allowed the agency to waive the requirements of prior notice and comment "where strict compliance is found to cause serious harm or injury to the public health, safety, or welfare, and such finding is set out in detail in such rule, regulation, or order." 15 U.S.C. § 766(i)(B).

Under the APA, courts have "reluctantly countenanced," *New Jersey* v. *EPA*, 626 F.2d 1038, 1045-46 (D.C. Cir. 1980), and narrowly construed the good cause exception. *See, e.g., Kollett* v. *Harris*, 619 F.2d 134, 145 (1st Cir. 1980); *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377, 379-80 (3rd Cir. 1979); *U.S. Steel* v. *EPA*, 595 F.2d 207, 214 (5th Cir.), *clarified on other grounds*, 598 F.2d 915 (5th Cir. 1979); *National Nutritional Foods Ass'n* v. *Kennedy*, 572 F.2d 377, 384 (2d Cir. 1978); *American Iron & Steels Inst.* v. *EPA*, 568 F.2d at 292. Such cautious approaches to the "good cause" exception find ample support in the legislative history surrounding the APA:

> "Impracticable" means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its underlying public rule-making proceedings. "Unnecessary" means unnecessary so far

> as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. "Public interest" supplements the terms "impracticable" or "unnecessary;" it requires that public rule-making procedures shall not prevent an agency from operating, and that, on the other hand, lack of public interest in rule-making warrants an agency to dispense with public procedure.

S. Rep. No. 752, 79th Cong., 1st Sess., at 16 (1945). *See* S. Rep. No. 248, 79th Cong., 2d Sess., at 200 (1946); Attorney General's Manual on the Administrative Procedure Act, at 12-13 (1947).

Because of the narrow scope of the "good cause" exception, it is insufficient for an agency merely to state that good cause exists. *See, e.g., Mobil Oil Corp.* v. *DOE*, 610 F.2d 796, 803 (TECA 1979), *cert. denied*, 446 U.S. 937 (1980). It is sufficient, however, if a recital of good cause is justified by obvious and compelling facts that can be judicially noticed. *See, e.g., Shinek* v. *DOE*, ____ F.2d ____, slip opinion, at 5-6 (TECA September 14, 1981); *Kollett* v. *Harris*, 619 F.2d at 144-45; *National Helium Corp.* v. *FEA*, 569 F.2d 1137, 1141-46 (TECA 1975); *Nader* v. *Sawhill*, 514 F.2d 1064, 1068-69 (TECA 1975); *Reeves* v. *Simon*, 507 F.2d 455, 458-59 (TECA 1974), *cert. denied*, 420 U.S. 991 (1975); *California* v. *Simon*, 504 F.2d 430, 439 (TECA 1974), *cert. denied sub nom. California* v. *Sawhill*, 419 U.S. 1021 (1974); *DeRieux* v. *The Five Smiths Inc.*, 459 F.2d 1321, 1332-33 (TECA), *cert. denied*, 419 U.S. 896 (1974).

The FEAA "good cause" exception was also narrowly construed. As evidenced by the legislative history of the FEAA, Congress intended that the agency would use this exception "very sparingly."Conference Rep. No. 93-788, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News, at 2977. Like the practice under the APA, in order to invoke the FEAA provision, the agency had to make a published, or unpublished, finding of good cause. *See, e.g., Standard Oil Co.* v. *DOE*, 596 F.2d at 1062.

Examining the September 5, 1974 rule under the APA standards, it appears from the preamble, and from the agency's present discussion of the market conditions surrounding the promulgation of the September 5, 1974 rule, that the basis for the assertion of "good cause" was a perception that an ambiguity in the Regulations could result or had resulted in selecting banking and discriminatory pricing against independents and various geographic regions, and that agency action was necessary to insure that such pricing practices were not put into effect or continued. 39 Fed. Reg. at 32307 (September 5, 1974). This ambiguity, the agency believed, had been highlighted by an increased supply situation in 1974 which had contributed to a decline in selling prices. According to the defendants, this change in the supply situation had prompted the agency to reevaluate its entire regulatory scheme in mid-1974. Under these circumstances, the defendants continue, the September 5, 1974 rule was promulgated as soon as it reasonably could have been.

Although the eradication of discriminatory pricing practices is an important aim of the regulatory system, it does not follow that the mere existence of such practices, without more, invariably provides justification for issuing rules under the "good cause" exception. To maintain that an agency action in furtherance of regulatory objectives amounts to "good cause" would be to engraft the general rulemaking requirements onto the exception. In order to have warranted the suspension of normal rulemaking procedures under the "good cause" exception, there must have been some type of exigency. Here, there [were] no compelling circumstances surrounding the discriminatory pricing practices cited by the agency. No users had been totally deprived of a supply of motor gasoline, no violence had surfaced or appeared imminent, and, more importantly, no sudden, disruptive change appears to have occurred with respect to either the distribution or pricing of motor gasoline on or about the time the September 5, 1974 rule had issued. *See, e.g., U.S. Steel* v. *EPA*, 595 F.2d at 214 n.15; *Reeves* v. *Simon*, 507 F.2d at 459; *California* v. *Simon*, 504 F.2d at 440 n.10.

The Court thus concludes that because it issued without good cause, the September 5, 1974 rule was procedurally invalid, and without effect upon recoveries under the original three cent rule. It therefore becomes unnecessary to consider the other challenges to the validity of the September 5, 1974 rule.

C.

The defendants go on to assert, in the alternative, that an equal application rule with a deemed recovery component was validly repromulgated in a rulemaking that commenced on September 10, 1974, and concluded on December 5, 1974. In support of this contention, the defendants claim that the September 10 notice of proposed rulemaking invited comments on the requirement of equal application and on the general matter of unlimited pricing flexibility. The defendants argue further that oral and written comments received during the rulemaking period reflect the industry's awareness that the agency was reevaluating the equal application and deemed recovery requirements.

The Court does not share the defendants' perception of the agency's rulemaking activities between September 10 and December 5, 1974.

Section 4 of the APA requires a notice of proposed rulemaking to include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). This requirement serves the purpose of allowing meaningful comment by the public on contemplated agency action. Hence, "the adequacy of the notice must be tested by determining whether it would fairly apprise interested persons of the "subject and issues' before the Agency."*American Iron & Steel Inst.* v. *EPA*, 568 F.2d 284, 293 (3d Cir. 1977).

Under this standard of adequacy, the September 10, 1974 notice altogether fails to pass muster. Nothing in the September 10 preamble suggests that the agency was interested in evaluating *de novo* a requirement of equal application of increased product costs in prices below base prices. Indeed, the only notice afforded

by the agency concerned only *modifications* of such a requirement, and specifically advised interested persons that the agency was not contemplating the elimination of the requirement. As for the comments actually submitted by interested persons, a fair reading of the administrative record fails to support the defendants' assertion that interested parties were generally aware of the opportunity available to them to comment on the underlying merits of an equal application or deemed recovery rule. *Cf. Wagner Electric Corp.* v. *Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972).

For this reason, it is apparent that no valid equal application rule, with or without a deemed recovery component, was promulgated on December 5, 1974.

D.

Turning now to the challenges to the May 5, 1977 rule, this Court has determined that no valid equal application requirement affecting the pass-through of increased product costs in actual sales prices and in base prices existed in December, 1974. After examining the regulatory activities during the years 1975 and 1976, and during the Spring of 1977, this Court must further conclude that no valid equal application requirement, or deemed recovery rule, was in effect at the time of the May 5, 1977 amendment.

The Court therefore holds that the May 5, 1977 amendment to the price rule effected a substantive change in the Regulations, and thus should have issued in accordance with applicable rulemaking procedures. Because these procedures were not followed, the amendment was unlawful.

III.

Accordingly, it be and hereby is

ORDERED, that the plaintiffs' motion for summary judgment is granted and the defendants' cross-motion for summary judgment is denied; and it is further

ORDERED, ADJUDGED, AND DECREED, that the original three cent rule, 10 C.F.R. § 212.83(c)(2), contained no equal application requirement pertaining to the pass-through of increased product costs; and it is further

ORDERED, ADJUDGED, AND DECREED, that the September 5, 1974 equal application rule, with the deemed recovery component, 10 C.F.R. § 212.83(d)(1), was procedurally invalid; and it is further

ORDERED, ADJUDGED, AND DECREED, that the December 5, 1974 cost bank rule, 10 C.F.R. § 212.83(e)(1), was procedurally invalid; and it is further

ORDERED, ADJUDGED, AND DECREED, that the May 5, 1977 amendment to the price rule, 10 C.F.R. § 212.83(h)(2)(iv), was procedurally invalid.

Dated: September 21, 1982
Syracuse, New York

s/ HOWARD G. MUNSON
Howard G. Munson
Chief U.S. District Judge

UNITED STATES OF AMERICA

District Court for the Western District of Michigan

SOUTHERN DIVISION

Case No. G79-14 CA6

NAPH-SOL REFINING COMPANY,

Plaintiff,

v.

MURPHY OIL CORPORATION,

Defendant.

OPINION RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FOURTH CAUSE OF ACTION

Presently before the court is defendant's motion for summary judgment on plaintiff's fourth cause of action. The court held this motion in abeyance when it issued its earlier opinion on defendant's various motions. Following a status conference at which the importance and applicability of the deemed recovery rule were clarified, the court is now prepared to address defendant's motion.

Plaintiff seeks to apply the equal application and deemed recovery rules to Murphy in support of its claims for overcharges in the fourth cause of action. Plaintiff claims that:

> "52. During each month of the period relevant to this complaint, Murphy has applied a lesser proportion of its increased costs to its own employee-operated "Spur" retail outlets than it has applied in determining its selling prices to Naph-Sol.

53. During each month of the period relevant to this complaint, Murphy has applied a greater proportion of its increased costs to the class of purchaser in which Naph-Sol properly belongs than it has applied, on a proportionate basis, to other classes of purchaser."

Based on these allegations, plaintiff claims that defendant miscalculated the amount of "banked" costs available for recoupment in each month and improperly computed the maximum allowable prices for covered products sold to plaintiff. Defendant Murphy Oil has moved for summary judgment arguing that the deemed recovery rule is both procedurally and substantively invalid.

STANDARD FOR SUMMARY JUDGMENT

On a motion for summary judgment, the movant has the burden of showing conclusively that there exists no genuine issue as to material fact and that the moving party is entitled to summary judgment as a matter of law. *Smith* v. *Hudson*, 600 F.2d 60 (6th Cir. 1979); *Tee-Pak, Inc.* v. *St. Regis Paper Co.*, 491 F.2d 1199 (6th Cir. 1974).

In determining whether there are issues of fact requiring a trial, "the inferences to be drawn from the underlying facts contained in the [affidavits, attached exhibits and depositions] must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). *Accord, Bohn Aluminum & Brass Corp.* v. *Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962). Even if the basic facts are not disputed, summary judgment may be inappropriate when contradictory inferences may be drawn from them. *Diebold, supra; EEOC* v. *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 189*, 427 F.2d 1091, 1093 (6th Cir. 1970). In making this determination, the court must make reference to the entire record and all well-pleaded allegations are to be accepted as true. *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975). These guidelines will be adhered to as substantive issues of the various motions are examined.

EQUAL APPLICATION

As will be explained more fully below, the deemed recovery rule was adopted as an amendment to the refiner's price rule, 10 C.F.R. § 212.83, on August 30, 1974. 39 Fed. Reg. 32306 (Sept. 5, 1974). Stated simply, the rule required that refiners either pass through equal increments of increased product costs over May 15, 1973, selling prices to all purchasers of a particular product, or charge different increments, but absorb the differences rather than "banking" or carrying over the unrecouped costs. An important preliminary issue, which may affect the procedural validity of the deemed recovery rule, is whether the prior regulations required such "equal application."

The original regulations were adopted by the Cost of Living Council under the Economic Stabilization of 1970, 12 U.S.C. § 1904 (note), on August 22, 1973. 6 C.F.R. § 150, Subpart L, 38 Fed. Reg. 22536 (Aug. 22, 1973). These controls placed ceilings on the prices which refiners could charge for covered products. They did not require that the maximum allowable prices be charged, a theme which would carry through the entire regulatory period.

The first suggestion of an equal application requirement appears in the preamble to these original regulations. It states in part:

> "Any increase in base prices . . . of a product due to increased costs of crude petroleum or increased costs of imports must be applied equally to all classes of purchasers of that product."

38 Fed. Reg. 22536, 22537. The regulations describing allocation of increased crude oil costs for special products (gasoline, #2 oils) stated:

> "[A] refiner may, in computing its base prices for [special products] . . . include an amount to reflect increased costs . . . which are attributable to that product. . . . In no case may the ratio that the attributed part bears to the total increased costs . . . exceed the ratio which sales during the corresponding fiscal quarter of the preceding year of the

> particular product receiving this allocation bears to the total sales of covered products during the same quarter."

Sections 150.356(f), 150.357(d). 38 Fed. Reg. at 22540, 22541. For covered products other than special products (also referred to herein as nonspecial products) the rules stated:

> "[A] refiner may, in computing its base prices for [nonspecial products] . . . include an amount to reflect increased costs . . . which are attributable to all of its covered products. To the extent that a refiner does not allocate increased costs . . . pursuant to this paragraph, it may include that part of its increased costs . . . attributable to [special products] in computing its base prices for those products. . . ."

Sections 150.356(e), 150.357(c). 38 Fed. Reg. at 22540, 22541.

Both section 150.356 (allocation of increased costs of imported crude oil) and section 150.357 (allocation of increased costs of domestic crude oil) concluded with the requirement that "[t]he amount of increased costs . . . included in computing . . . base prices of a particular product must be equally applied to each class of purchasers of that product."

The basic refiner's price rule stated:

> "A refiner may not charge a price for an item in excess of the base price of that item except [prenotified, nonproduct cost increases]."

Section 150.358(b), 38 Fed. Reg. at 22541.

In its memorandum in support of its motion for summary judgment, defendant argues that the equal application rule applied only to nonspecial products. This completely ignores the early history of the regulations. The original regulations, as quoted above, clearly require equal application for all products.

On September 12, 1973, the regulations were amended and clarified. 38 Fed. Reg. 25686 (Sept. 14, 1973). At that time a formula was introduced which was to be used to calculate the maximum amount of increased crude oil costs which could be added to the May 15, 1973 selling price of a particular product.

Section 150.356(c)(2). The formula yielded a "D" term which was defined as "The dollar increase that can be applied to each May 15, 1973, selling price of the covered product concerned to each class of purchaser to compute . . . the . . . base price to each class of purchaser." 38 Fed. Reg. at 25688. The same formula and the same "D" term applied to both special products and products other than special products. Section 150.356(c)(1) allowed the carryover of unrecouped costs. Section 150.356(e) stated that refiners could increase prices other than a special product to reflect increased crude oil costs, "provided that the amount of increased costs included in computing base prices of a particular covered product other than a special product must be equally applied to each class of purchaser." The explicit equal application requirement no longer included special products.

On October 31, 1973, further amendments were promulgated. 38 Fed. Reg. 30267 (Nov. 2, 1973). These retained the single formula scheme with an express equal application requirement for computing base prices of nonspecial products only. *Compare* § 150.356(c)(i) *with* § 150.356(c)(ii). A new section 150.356(d) was introduced containing banking provisions. This section expressly required equal application of banked costs to each class of purchaser of *nonspecial* products in computing base prices.

For special products the carryover provision stated

> "If . . . a firm charges prices for a special product . . . which result in the recoupment of less total revenues than the entire amount of increased costs of . . . crude petroleum calculated for that product . . . the amount of increased costs not recouped may be added to the May 15, 1973, selling prices to compute the base prices for that special product . . . for a subsequent month."

Section 150.356(d)(i).

On November 30, 1973, 38 Fed. Reg. 33577 (Dec. 6, 1973), the rules were significantly amended with the introduction of two general allocation formulas, one for the special products, the other for nonspecial. Section 150.356(c)(2). The general

formula for special products established "the dollar increase that may be applied . . . to the May 15, 1973 selling price of the special product . . . of the type 'i' to each class of purchaser to compute the base price to each class of purchaser." This amount is designated in the formula as "d_i^u". This formula is almost identical to the former single formula adopted in September, 1973. *Compare* "D" at 38 Fed. Reg. 30270 *with* "d_i^u" at 38 Fed. Reg. 33580.

The requirement of equal application in computing base prices for nonspecial products again appeared at section 150.356(c)(1)(ii).

> "In computing base prices for a covered product other than a special product, a refiner may increase its May 15, 1973 selling price to each class of purchaser . . . by an amount to reflect the increased product costs attributable to sales of covered products other than special products . . . provided that the amount of increased product costs included in computing base prices of a particular covered product other than a special product must be equally applied to each class of purchaser."

Similarly, section 150.356(d)(2) required equal application of banked costs when used to compute base prices of nonspecial products. *Cf.* § 150.356(d)(1) (no express equal application requirement when applying banked costs to special products).

On December 27, 1973, the regulations were repromulgated by reference in 10 C.F.R. § 201. 39 Fed. Reg. 744 (Jan. 2, 1974.)On January 14, 1974, the regulations were republished in full at 10 C.F.R. § 212. 39 Fed. Reg. 1924 (Jan. 15, 1974). More specifically, 6 C.F.R. § 150.356 became 10 C.F.R. § 212.83. The relevant regulations remained unchanged from those promulgated on October 30, 1973, and quoted above. These were also the regulations as they existed immediately prior to the adoption of the deemed recovery rule.

The regulations clearly required equal application of increased nonproduct costs for both special and nonspecial products. 10 C.F.R. §§ 212.83(c)(2)(i)(b), ii(b), 39 Fed. Reg. at 1953. At issue is whether these regulations required equal application of

increased product costs even if a refiner chose to sell product at less than the maximum allowable price.

All of the regulations quoted above refer to the equal application rule in terms of computing *base prices*. The August 17, 1973, regulations defined "base price" for a particular product as "the weighted average price at which that item was lawfully priced in transactions on May 15, 1973 . . . plus increased costs of [crude oil]. . . ." Section 150.358(g).

Defendant attacks the equal application rule by arguing that it applies only when establishing a "base price" which defendant argues is the single maximum allowable price for a particular product. Therefore, defendant argues there is no equal application requirement if a refiner sells product at prices below the maximum allowed.

Defendant, however, is in the somewhat difficult position of arguing that the "base price" is a single maximum lawful price at which covered products could be sold, (Def's. Mem. in Support of Motion, at page 18) and was also a flexible number whereby "a refiner had discretion to establish a *base price* that included only a portion of [the maximum increment of increased product cost that could be added to the weighted average May 15, 1973, price]. "(Emphasis added.) *Id.* at 22.

The distinction is critical. Since all of the regulations addressing equal application address it only in terms of computing a base price, if the base price is a fixed maximum number, then *arguably* (as defendant suggests), the rule applies only at maximum allowable prices. Conversely, if the "base price" is that price which the refiner determines by deciding how much increased costs to allocate to a product, then the rule applies to the process of establishing the "base price" even if the refiner sets a base price less than the maximum allowable amount.

The court notes the apparent difficulty in deciding whether prices below the maximum are "base prices." *See Standard Oil Co.* v. *DOE*, 596 F.2d 1029, 1040-1045 (TECA, 1978) and defendant's allegations set out above concerning refiners' discretion to establish base prices. In addition, the court notes a recent

decision in *Mobil Oil* v. *DOE*, No. 79-CV-11 (N.D.N.Y. Sept. 21, 1982). At page 35 (slip opinion), the district judge states that "the rule refers only to the computation of base prices, not to the computation of actual selling prices below base prices." Two sentences later he states:

> "In this regard, the Temporary Emergency Court of Appeals [TECA] has indicated that under the base price rules, a refiner was not required to add all increased product costs arrived at under the general formula in determining base prices; *that a refiner could vary its base prices* according to the amount of increased product costs applied to May 15, 1973 selling prices; and that the sum represented by adding all increased product costs calculated under the formula to the May 15, 1973 selling price was the maximum base price, *rather than the only base price. See Standard Oil* v. *DOE*, [*supra*]."

In *Standard Oil, supra*, TECA was called on to decide whether the "base price" for special products was a single maximum amount. At issue was a regulation which required that all product cost increases (PCIs) be passed through before non-product cost increases (NPCIs). Since unrecouped NPCIs could not be banked, some refiners were passing through NPCIs first, and banking PCIs which could not be passed through. DOE promulgated the challenged regulation without notice and comment. DOE argued that the base price was a single identifiable number arrived at by adding the "d_i^u" term for a given month and product, to the May 15, 1973, selling price, and that NPCIs could only be passed through after the PCIs established by the d_i^u term had been figured into the base price. The lower court held that the base price for special products was flexible; that refiners had discretion to use less than the maximum allowable costs in establishing base prices, to which it could then add its NPCIs. 453 F. Supp. 203 (N.D. Ohio, 1978).

On appeal, TECA held the promulgation invalid because "a 'fixed' base price interpretation [of the prior regulations] was not compelled." 596 F.2d at 1045. The fixed base price interpretation not being compelled, notice and comment were necessary prior to

amending the regulations. The argument is even less compelling for nonspecial products, where the D_i^u term is significantly more amorphous. After reviewing defendant's analysis and the TECA decision in *Standard Oil*, the court finds that it agrees with defendant's characterization of prices below the maximum allowable price as "base prices." Therefore, the equal application rule applied whenever a refiner determined its base price, whether or not it was the maximum allowable base price.

One final issue concerning the equal application rule; does it apply to special as well as nonspecial products? Defendant contends that the equal application rule applies only to nonspecial products, and is necessary only because the "D_i^u" term for nonspecial products simply defines a lump sum dollar amount which may be apportioned to nonspecial products. The court finds this analysis unsupportable since the rule preceded the appearance of the separate "d_i^u" term which can be added to each class of purchaser [a]s a single, fixed increment. This is exactly the argument the Northern District of Ohio rejected, but which TECA did not reach, in *Standard Oil* v. *DOE*, *supra*. This court agrees, the base price for special products is not fixed, and therefore does not of itself require equal application.

In determining the applicability of the equal application rule to special products, the court turns to the early history of the regulations. When the original CLC regulations were promulgated in August, 1973, they explicitly required equal application for both special and nonspecial products. Sections 150.356(e), 150.357(c), 38 Fed. Reg. at 22450, 22451. The express equal application requirement was deleted when the regulations were amended on September 12, 1973. Since the "D" term used in the formula which was introduced in the September promulgation, does not require equal application (*see* discussion at 453 F. Supp. at 224-226), there is no equal application requirement. It appears that the equal application requirement for special products was simply deleted.

The court thus finds that the equal application rule applied to special products prior to September 12, 1973, and applied to

nonspecial products at least up until September, 1974. Further, the rule applied at maximum prices and in determining base prices below the maximum.

DEEMED RECOVERY RULE

It was against this regulatory background that the deemed recovery rule was promulgated. It was promulgated without notice and an opportunity to comment on August 30, 1974. 39 Fed. Reg. 32306 (Sept. 5, 1974). The agency did not label the promulgation interpretive, but chose instead to waive the notice and comment requirement based on exigent circumstances. The notice of promulgation reflected the agency's interpretation of prior regulations as requiring equal application of increased product costs at less than maximum allowable base price. The statement also noted the changing market conditions had highlighted an ambiguity in the regulations.

> "In general, these regulations have resulted in the equal application of increased product costs among classes of purchaser. An ambiguity in the regulations, however, is that sellers are not specifically required actually to charge the prices arrived at under the regulations. As an improved supply situation has begun to have a restraining influence on prices, the [agency] has become aware that certain sellers have taken the position that they may selectively 'bank' increased product costs as to certain classes of purchaser, for recoupment in a subsequent month, as long as the prices charged to other classes of purchaser do not exceed the maximum lawful price. Such practices could obviously serve to avoid the intent of the overall framework of the price regulations, and the [agency] is undertaking to insure that these pricing practices are not put into effect."

Id. at 32307. The deemed recovery rule was intended

> "to clarify and make explicit the requirement that prices charged for each covered product must reflect the equal application of increased product costs to each class of purchaser, and that failure to charge prices that reflect

> equal application of increased product costs except to the extent the seller is precluded from charging such prices by the price term of a contract . . . will result in unrecouped increased product costs which the seller will not be permitted to recover in a subsequent month. . . .
>
> At the same time, the FEA has concluded that its regulations should be clarified in this regard, so that all sellers will be expressly on notice that prices actually charged, and not merely prices calculated as a lawful maximum, must reflect the equal application of increased product costs, except where a pre-existing contract prevents the implementation of such a price."

Id.

The amendment itself actually operated on the banking provisions of section 212.83(d), by

> "amending . . . regulations providing for the carryover of unrecouped increased product costs by a seller. Thus, for each product the recoupment of increased product costs will be calculated on the assumption that the largest amount of increased product cost added to the May 15, 1973 selling price and included in the price charged to any class of purchaser, was equally applied to the price charged to all class[es] of purchaser, without regard to whether such prices were, in fact, charged."

Id. The amendment did not affect a refiner's ability to charge less than the maximum allowable base price. It merely limited the ability to *selectively* apply higher increased costs to some purchasers, while banking unrecouped costs not passed through to other purchasers.

The notice of promulgation also discussed the contract exception, which allowed recovery of unrecouped increased product costs which did not reflect equal application, where the seller's recovery was limited by a pre-existing contract. This situation was one aspect of the agency's finding of an emergency.

> "The [agency] has concluded that these amendments must be made effective on September 1, 1974, prior to

> opportunity for comment, upon a finding that an emergency exists. It has only recently come to [the agency's] attention that certain sellers have implemented and continue to implement prices which do not conform to the [agency] concept of preserving May 15, 1973 price differentials among various classes of purchaser. To the extent that there is ambiguity in the current regulations, compliance efforts as to such sellers are more difficult. And, as the supply situation becomes more favorable, the incentive to depart from the equal application requirement becomes stronger. Moreover, announcement of these amendments as proposals would highlight current ambiguities in the regulations and could result in sellers seeking to take advantage of that ambiguity or of the contract exception to the regulation.
>
> The [agency] has determined that the continuation of initiation of such practices would be injurious to the public welfare, in view of the number of circumventions of [agency] regulations and the substantial compliance difficulties which would result."

Id.

The notice closed by noting that the agency was preparing further proposed revisions to the price regulations, and that public hearings would be held within the month on those revisions, at which time the agency would take comments on the deemed recovery rule.

In moving for summary judgment on plaintiff's fourth cause of action, defendant Murphy Oil challenges plaintiff's right to recover alleged overcharges on the grounds that the deemed recovery rule was procedurally and substantively invalid. For the reasons that follow, I find that the deemed recovery rule was invalidly promulgated. Therefore, it will be unnecessary to address defendant's substantive challenge to the deemed recovery rule.

ADMINISTRATIVE PROCEDURE

Both the rulemaking provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, and the Federal Energy

Administration Act (FEAA), 15 U.S.C. § 761, *et seq.*, applied to the Federal Energy Administration's (FEA) September 5, 1974, rule promulgation. *See, Mobil Oil Corporation* v. *Department of Energy*, ____ F. Supp. ____, No. 79-CV-11 (N.D.N.Y. filed Sept. 21, 1982); *Lakes Gas Co.* v. *Department of Energy*, 477 F. Supp. 187, 189 (D. Minn. 1979). The APA provides that notice of a proposed rule be published in the Federal Register and that interested persons be given the opportunity to comment on the proposed rule. 5 U.S.C. § 553(c). The APA further requires that a proposed rule be published 30 days before its effective date. 5 U.S.C. § 553(d). The FEAA requires that any proposed rule be published ten days in advance of a rule's effective date to provide interested parties the opportunity to comment on the proposed rule. 15 U.S.C. § 766(i)(B)(c).

Under the APA and the FEAA, notice and comment requirements can be waived under narrow exceptions. *See, New Jersey* v. *Environmental Protection Agency*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *Shell Oil Co.* v. *Federal Energy Administraiton*, 574 F.2d 512 (TECA 1978). Under the APA, an agency is permitted to promulgate a regulation without prior notice and opportunity for comment where the agency, for good cause, finds the procedure to be impracticable, unnecessary, or contrary to the public interest, 15 U.S.C. § 553(b)(B). Under the more stringent requirements of the FEAA, notice and comment procedures could be waived only if compliance with formal rulemaking procedures would result in serious harm or injury to the public welfare, 15 U.S.C. § 766(i)(B), *redesignated*, Department of Energy Organization Act § 709 (1977), 42 U.S.C. 7191(e).

Notice and comment procedures were applicable to the September 5 rule promulgation. Under the FEAA, notice and comment procedures were required where an agency promulgation was likely to have a substantial impact on the nation's economy or large numbers of individuals or businesses, 15 U.S.C. § 766(i)(1)(C). This requirement applied not only to rules and regulations but also to orders similar to rules or regulations.

Conference Report No. 93-788, 93rd Cong., 2d Sess. *reprinted in* (1974) U.S. Code Cong. & Ad. News 2977.

Although the APA generally exempts agencies from notice and comment procedures when promulgating interpretative rules, 5 U.S.C. § 553(b)(3)(A), agencies are not exempt from notice and comment procedures where notice and comment procedures are required by statute. 5 U.S.C. § 553(b). Thus, since the FEAA statutorily required notice and comment procedures to be followed in promulgating orders that were similar to regulation, the deemed recovery rule was subject to formal rulemaking procedures of the APA and the FEAA regardless of whether or not the deemed recovery rule was an interpretative ruling of a prior regulation or a new rule. *See Lakes Gas Co., supra*, at 190.

Since the deemed recovery rule was subject to notice and comment requirements, the FEA's waiver of formal rulemaking procedures can only be justified by compelling circumstances. *Mobil Oil Corp.* v. *Department of Energy*, 610 F.2d 796 (TECA 1979); *Nader* v. *Sawhill*, 514 F.2d 1064 (TECA 1975). In the present case, FEA waived notice and comment because it stated that compliance with formal rulemaking procedures would be injurious to the public welfare. 39 Fed. Reg. 32307 (Sept. 5, 1974). FEA's assertion that an emergency existed was based on FEA's finding that due to an ambiguity in the regulations, certain sellers had taken the position that they could selectively "bank" increased product costs as to certain classes of purchaser for recoupment in a subsequent month against other classes of purchaser. *Id.*

FEA feared that this practice, which was permitted where a seller was bound by contractual arrangements, *see*, FEO Ruling 1974-12, 39 Fed. Reg. 18423 (May 20, 1974), would become widespread if the agency complied with formal rulemaking procedures. FEA believed that publication of the proposed rule would have alerted sellers to the ambiguity in the regulations and invited sellers to evade the effect of the future rule by entering into long term contracts during the rulemaking period. This practice, allegedly, would have resulted in discriminatory pricing against

independents and various geographic regions. Under these circumstances, FEA believed that an emergency existed which permitted the waiver of formal rulemaking procedures. I disagree.

As noted earlier, exceptions to the notice and comment provisions are to be used "very sparingly," Conf. Report *supra* at 2977. Case law establishes that noncompliance with rulemaking procedures is to be tolerated only in "calamitous circumstances." *Nader* v. *Sawhill*, *supra*, at 1069. Waiver of notice and comment procedures is only permitted where there is an immediate need for a regulation to avoid severe economic consequences. *Shell Oil Corp.* v. *Federal Energy Administration*, *supra*; *Tasty Baking Co.* v. *Cost of Living Council*, 529 F.2d 1005 (TECA 1975); *California* v. *Simon*, 504 F.2d 430 (TECA 1974).

Both *Nader* v. *Sawhill*, *supra*, and *Shell Oil*, *supra*, are instructive in determining when notice and comment procedures may be waived. In *Nader*, TECA upheld an immediate price increase of $1 per barrel on "old" crude oil. The increase, which was promulgated without notice and comment was upheld on the grounds that an immediate need for crude oil was needed due to the Arab oil embargo. TECA specifically stated that its holding was limited to the unique circumstances of that case. *Nader*, *supra* at 1069. In *Shell Oil*, TECA held that notice and comment could not be waived to issue ceiling price regulations on unleaded gasoline despite the fact that the need for unleaded gasoline was immediate and the only alternative was to put unregulated fuel on the market.

In the present case, there were no compelling circumstances surrounding the discriminatory pricing practices cited by the agency, or discernible to this court, to justify waiver of formal rulemaking procedures. In September of 1974, there was no apparent disruption of petroleum supplies or distribution which created an immediate threat to the public. *Cf. Nader*, *supra* (disruption of supply). Indeed, the agency itself, in its September 5 promulgation, stated that petroleum supplies were increasing. 39 Fed. Reg. 32308. Furthermore, had FEA complied with notice and comment procedures, sellers would only have had ten days in

which to enter long-term contracts to avoid the effects of the deemed recovery rule. 15 U.S.C. § 766(i)(1)(B). It is highly unlikely that enough long-term contracts could have been entered into in that brief period which would have created a severe economic impact on the national economy. Such a determination would be highly speculative. Thus, the court concludes that the perceived emergency did not rise to the level of "calamitous circumstances" which would justify the waiver of formal rulemaking procedures. As a result, I find the September 5, 1974, promulgation of the deemed recovery rule to be procedurally invalid. Therefore, plaintiff is not entitled to recover alleged overcharges based on defendant's breach of the deemed recovery rule.

SUBSEQUENT PROCEEDINGS

Plaintiff and DOE both argue that even if the September 5th promulgation was procedurally invalid, any procedural infirmities were cured by the September 6, 1974, notice of proposed rulemaking, 39 Fed. Reg. 32718 (Sept. 10, 1974), the comment period which followed, and subsequent republication of the equal application rule on November 29, 1974. 39 Fed. Reg. 42368 (Dec. 5, 1974). The agency closed its September 5th rulemaking by stating:

> "The FEA will, however, receive public comment on the amendments issued today. The FEA is preparing further proposed revisions to the price regulations. Public hearings respecting the proposed revisions and the amendments issued today are anticipated in September. The FEA will solicit written and oral comments during these proceedings, notice of which will appear in the FEDERAL REGISTER in the near future."

Id. at 32307. The September 10th notice of proposed rulemaking followed. In its notice, the agency discussed several aspects of the rule which were undergoing administrative review, *e.g.*, regional pricing differentials and inflexibility which was at odds with certain EPAA mandates. The discussion concluded by stating, at page 32723:

> "However, to the extent that the current [equal application] requirement serves to protect the independent sector of the market, FEA has concluded that it must be retained. Accordingly, the FEA proposes to amend the equal application requirement so that different amounts of increased product costs may be added to the prices charged to different classes of purchaser of a product, provided that the amount added to the prices charged to any class of purchaser that includes independent marketers cannot be greater than the amount added to the prices charged to any other class of purchaser of the same product, except to the extent that a refiner is selling to a particular purchaser at a lower price under a pre-existing written contract.
>
> Comments are specifically requested as to whether this provision will adequately protect the independent sector of the market, or whether other restrictions on the application of increased product costs are required and, if so, what they should be."

Numerous other amendments to the regulatory scheme were also proposed in the September 10 notice.

On November 1, 1974, one of the unrelated proposed amendments was adopted. 39 Fed. Reg. 39259 (Nov. 6, 1974). In its notice of promulgation the agency stated, "Action on all other revisions to the price regulations proposed in the September 10 notice is deferred until a later date. However, these possible revisions continue to be under active consideration by [the agency] for decision in this proceeding." *Id.* No mention was made of the equal application or deemed recovery rules.

A second aspect of the September 10th proposal was promulgated on November 29, 1974. 39 Fed. Reg. 42368 (Dec. 5, 1974). This promulgation deleted the pre-notification procedures for nonproduct cost increases, redefined non-product costs, and defined refinery fuel as a nonproduct cost. The preamble to the promulgation contained a provision almost identical to the one quoted above from the November 1st promulgation. No mention was made of the equal application or deemed recovery rules, although they were republished.

The procedural validity of this process is almost identical to the question this court addressed in upholding the validity of the 1976 amendment to the "V" factor in its opinion of September 17, 1982. The two issues are whether the later notice and comment process was sufficient, and whether the later promulgation was an effective promulgation of the challenged rule. The court found the 1976 "V" factor amendment valid because the notice was sufficient to make interested parties aware of the proposed regulation and its ramifications. Although the present situation is very similar, the court finds it unnecessary to address the notice issue since it finds the promulgation itself invalid.

As stated in the court's earlier opinion:

> "[t]his argument is based on . . . the failure to discuss the issue in the 'general statement of . . . basis and purpose,' required by 5 U.S.C. 533(c). . . . As stated in *Rodway* [v. *United States Department of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975)]:
>
> > 'The basis and purpose statement is not *intended to be an abstract explanation addressed to imaginary complaints*. Rather, *its purpose is*, at least in part, *to respond* in a reasoned manner *to the comments received, to explain* how the agency resolved any significant *problems raised by the comments*, and to show how that resolution led the agency to the ultimate rule.' (Emphasis added.)
>
> * * * *
>
> Moreover, agencies need not reply to each comment received.
>
> > '[I]t should be obvious that the Secretary need not answer each of the thousands of comments he received over a two-year period. *See Automotive Parts & Accessories Assn.* v. *Boyd*, 407 P. 330, 338 (D.D. Cir. 1968). Nor does every nonfrivolous 'substantive' inquiry merit a head-on response in the agency's general statement under 5 U.S.C. 533(c). Instead, the Secretary is obligated to identify and comment on only major issues raised during the proceeding which are central to his exercise or regulatory discretion. Judgments as to what

> issues are vital and material also are susceptible to review under the arbitrary and capricious standard. *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 35 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977)."

In its earlier opinion, the court found that the challenged issue did not rise to the status of a major issue requiring agency comment in the basis and purpose statement. The present situation is easily distinguished. The administrative record and DOE's analysis in its Amicus Memorandum, clearly demonstrate that the impact of the equal application and deemed recovery rules, especially on the independent segment of the industry, was a major issue in the public comment process. Accordingly, the agency's decision to promulgate the rule (or to repromulgate it without amendment) had to be supported by a statement "explain[ing] how the agency resolved any significant problems raised by the comments," for it to be a procedurally valid promulgation. *Rodway*, *supra*. The November 1, 1974, promulgation neither mentioned nor published the deemed recovery rule. The November 29, 1974, promulgation republished the rule, but provided no introductory remarks concerning its decision to retain it. Therefore, the rule was not properly promulgated.

Plaintiff suggests that several other republications were sufficient to validly promulgate the rule. The court finds these republications suffering from the same fatal lack of a basis and purpose statement.

Later promulgations did not cure the procedural invalidity of the original promulgation of the deemed recovery rule.

CONCLUSION

In summary the court finds the equal application rule applied to the establishment of base prices, whether at or below the maximum allowable base price for nonspecial products. It did not apply to special products after September 13, 1973.

The promulgation of the deemed recovery rule required full notice and comment procedures. The promulgation was therefore deficient and the rule invalid. Later agency actions did not cure these procedural defects.

/s/ DOUGLAS W. HILLMAN
Douglas W. Hillman
District Judge

Dated: October 1, 1982.

UNITED STATES OF AMERICA

District Court for the Western District of Michigan

SOUTHERN DIVISION

Case No. G79-14 CA6

NAPH-SOL REFINING COMPANY,

Plaintiff,

v.

MURPHY OIL CORPORATION,

Defendant.

ORDER

This matter is before the court on defendant's motion for summary judgment on plaintiff's fourth cause of action, and in accordance with the opinion filed this date,

IT IS HEREBY ORDERED that the equal application rule did apply to the establishment of base prices, whether at or below the maximum allowable base price for nonspecial products;

IT IS FURTHER ORDERED that the equal application rule did not apply to special products after September 13, 1973;

IT IS FURTHER ORDERED that the September 5, 1974, promulgation of the deemed recovery rule and all subsequent repromulgation[s] of the deemed recovery rule were procedurally invalid.

IT IS FURTHER ORDERED, therefore, that defendant's motion for summary judgment on the plaintiff's fourth cause of action is granted in part and denied in part.

/s/ DOUGLAS W. HILLMAN
Douglas W. Hillman
District Judge

Dated: October 1, 1982.

Temporary Emergency Court of Appeals of the United States

No. 2-40

MOBIL OIL CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION, and MARATHON OIL CORPORATION,
Plaintiffs-Appellees,

v.

THE DEPARTMENT OF ENERGY and JAMES B. EDWARDS,
Defendants-Appellants.

Before METZNER, PECK and LACEY, Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of New York and was argued by counsel. In consideration whereof,

IT IS ORDERED that the judgment of the District Court is affirmed in part, reversed in part, vacated in part, and remanded for further proceedings consistent with the opinion.

FOR THE COURT:

/s/ DONNA M. BOLD
DONNA M. BOLD
Clerk

December 20, 1983

(District Court No. 79-CV-11)

Temporary Emergency Court of Appeals of the United States

No. 2-40

MOBIL OIL CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION, and MARATHON OIL CORPORATION,

Plaintiffs-Appellees,

v.

THE DEPARTMENT OF ENERGY and JAMES B. EDWARDS,

Defendants-Appellants.

Before METZNER, PECK and LACEY, Judges.

ORDER

Upon consideration of the Petitions for Rehearing and/or Suggestions for Rehearing *En Banc* filed separately by the Plaintiff-Appellee Exxon Corporation and by the Plaintiffs-Appellees Mobil Oil Corporation, Gulf Oil Corporation and Marathon Oil Corporation,

IT IS HEREBY ORDERED that the Petitions for Rehearing are DENIED.

IT IS FURTHER ORDERED that the Suggestions for Rehearing *En Banc* are DENIED. The mandate is to issue February 17, 1984.

FOR THE COURT:

by: BRIAN M. MALSBERGER
Brian M. Malsberger
Deputy Clerk

February 10, 1984

Statutes and Regulations Involved

Section 4(b)-(c) of the Administrative Procedure Act, 5 U.S.C. § 553(b)-(c), provides:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —
>
> (1) a statement of the time, place and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> Except when notice of hearing is required by statute, this subsection does not apply —
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

Section 7(l)(l)(B) of the Federal Energy Administration Act, 15 U.S.C. § 766(i)(l)(B), provides:

> (l)(A) Subject to paragraphs (B), (C), and (D) of this subsection, the provisions of subchapter II of chapter 5 of title 5 shall apply to any rule or regulation, or any order having the applicability and effect of a rule as defined in section 551(4) of title 5, issued pursuant to this chapter, including any such rule, regulation, or order of a State or local government agency, or officer thereof, issued pursuant to authority delegated by the Administrator.
>
> (B) Notice of any proposed rule, regulation, or order described in paragraph (A) shall be given by publication of such proposed rule, regulation, or order in the Federal Register. In each case, a minimum of ten days following such publication shall be provided for opportunity to comment; except that the requirements of this paragraph as to time of notice and opportunity to comment may be waived where strict compliance is found to cause serious harm or injury to the public health, safety, or welfare, and such finding is set out in detail in such rule, regulation, or order. In addition, public notice of all rules, regulations, or orders described in paragraph (A) which are promulgated by officers of a State or local government agency shall to the maximum extent practicable be achieved by publication of such rules, regulations, or orders in a sufficient number of newspapers of statewide circulation calculated to receive widest possible notice.

10 C.F.R. § 212.83(d) (39 Fed. Reg. 32308 (September 5, 1974)), provided in pertinent part:

> (d) Carryover of costs.* * *
>
> (l) * * * With respect to each special product (i=l and i=2), when a firm calculates the amount of increased product cost not recouped, which may be added to the May 15, 1973 selling prices to compute the base prices for that special product in a subsequent month, it shall calculate its revenues as though the greatest amount of

increased product costs actually added to the May 15, 1973 selling price of that special product and included in the price charged to any class of purchaser, had been added, in the same amount, to the May 15, 1973 selling price of such product and included in the price charged to each class of purchaser; except that, where an equal amount of increased product cost is not included in the price charged to a purchaser because of a price term of a written contract covering the sale of such product which was entered into on or before September 1, 1974, that portion of the increased product costs not included in the price charged to such a purchaser need not be included in the calculation of revenues.

* * *

(2) * * * With respect to each covered product other than a special product, when a firm calculates the amount of increased product cost not recouped, which may be added to May 15, 1973 selling prices to compute base prices for covered products other than special products in the subsequent month, it shall calculate its revenues as though the greatest amount of increased product costs actually added to the May 15, 1973 selling price of each covered product other than a special product and included in the price charged to any class of of purchaser had been added, in the same amount, to the May 15, 1973 selling price of such product and included in the price charged to each class of purchaser; except that, where an equal amount of increased product cost is not included in the price charged to the purchaser because of a price term of a written contract covering the sale of such product which was entered into on or before September 1, 1974, such portion of the increased product costs not included in the price charged to such purchaser need not be included in the calculation of revenues.

List of Petitioners' Non-Wholly-Owned Subsidiaries and Affiliates Pursuant to Rule 28.1 of the Rules of this Court

Pursuant to Rule 28.1, Petitioners set forth the following statements of non-wholly-owned subsidiaries and affiliates.

Mobil Oil Corporation

Mobil Oil Corporation is a wholly-owned subsidiary of Mobil Corporation which is publicly held. Listed below are the affiliates and subsidiaries of Mobil Corporation, Mobil Oil Corporation, and their affiliates and subsidiaries which are or may be publicly held. For purposes of this list only companies in which a five percent (5%) or greater interest is held are considered:

NAME OF COMPANY

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Adria-Wien Pipeline Gesellschaft m.b.H.
AIMCO (ALPHA) Shipping Company
AIMCO (Blasbjerg) Limited
AIMCO (OMEGA) Shipping Company Ltd.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH
AK Chemie GmbH & Co KG
Akauma Rekisei Kogyo Kabushiki Kaisha
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian International Maritime Company Limited
Arabian International Maritime Company

The Arabian Petroleum Supply Company (S.A.)
Arabian Shipping & Trading Company S.A.
Arabian Trading Company S.A.
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
Ammenn GmbH
The Associated Octel Company Limited
Associated Octel Company (Plant) Limited
ATAS-Anadolu Tasfiyehanesi Anonim Sirketi
Atlas Sahara S.A.
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anonim Sirketi
B.V. Beheersmaatschappij MOBEM
Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH
Bayerische Mineral Industrie A.G.
Bin Sulaiman Mobil Towers
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trelleborg
Bostadsrattsforeningen Skepparegarden, Norrkoping
Braamkey Investments (Proprietary) Limited
Brazos Heights Housing Incorporated
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Cartoenvases Valencia, S.A.
Carton de Colombia, S.A.
Carton de Venezuela, S.A.

Cartones Nationales, S.A.
Celmisia Shipping Corporation
Celulosa y Papel de Colombia, S.A.
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercera S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Nenryo Gas Kabushiki Kaisha
Colombianos Distribuidores de Combustibles, S.A. (CODI)
Colonial Pipeline Company
Combustibles Colmerauer
Comet-Brennstoffdienst GmbH
Commodore Maritime Company, S.A.
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Compagnie Immobiliere (Comimmo)
Compagnie Regionale de Distribution de Produits Petroliers-C.O.R.E. Dis.
Compagnie Rhenane de Raffinage
Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA
Compania Colombiana De Forestacion S.A.
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Compania Mexicana de Especialidades Industriales, S.A. de C.V.
Consortium Raymond Duez
Constructora Calle 67, Limitada
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company
CORCOP
Corrugadora de Carton, S.A.
C.R.C. Lyon Chauffage
CRCP
Cyprus Petroleum Refinery Limited

D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Dai Nippon Jushi K.K.
Dearborn Land Company
De. Ba.-Industria Petrolifero
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depot de Petrole Cotiers
Depots Petroliers de La Corse (DPLC)
Deutsche Mobil Oil Exploration Ireland Ltd.
Deutsche Pentosin-Werke GmbH
Deutsche Transalpine Oelleitung GmbH
Dicomi S.r.l.
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
East Texas Salt Water Disposal Company
Emoleum (Asphalts) Limited
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre
Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Lagergesellschaft mbH
Erdoel-Raffinerie Neustadt Gmbh & Co. oHG
Erdoelbetrieb Reitbrook
Endoelraffinerie Gesellschaft mbH in Liquidation
Establissments Bouthenet
Establissements Nicol and Cie
Ets. Le Goff
Ets. R. Saillard
Etablissements Wagner
Faavang Autoverksted A/S

FACEL
Fairwind Maritime Company, S.A.
Felix Oil Company
Fibil, S.A.
Fibras Internacionales de Puerto Rico, Inc.
Filtroleo-Sociedade Portuguesa de Filtros Lda.
Filtros De Costa Rica S.A.
Finsbury Printing Limited
First Eastleigh No. 163 (Proprietary) Limited
Fountain Garage (East Park) Ltd.
Fountain Garage (Meadowhead) Ltd.
Fountain Garage (Mercury) Ltd.
Fountain Garage (Newbury Park) Ltd.
Fountain Garage (Stirchley) Ltd.
Frome-Broken Hill Company Proprietary Limited
Fruehmesser Mineraloelhandels GmbH & Co. KG
Fruehmesser GmbH
Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gaz Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Ghana Bunkering Services Limted
Goteborgs Branslesortering AB
Croupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
Handelmaatschappij Hugenholtz & Co. B.V.
H. van der Heijden Service Stations B.V.
Heizoel-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Imperial Gas Co. of P.R., Inc.

Inmunizadoras Unidas, S.A.
Industria De Carbon Del Valle Cauca, S.A.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions Limited
Iraq Petroleum Transport Company Limited
Istanbul Petrol ve Makine Yaglari Limited Sirketi
Japan Airport Fueling Service Co. Limited
Japan Solar Energy Co., Ltd.
J.E.C.O.P.
K. D. Keysers Investments (Proprietary) Limited
K.K. Sankyo Plastics
K.K. Toresen
Kanto Kygnus Sekiyu Hambai K.K.
Kanto Oil Pipeline Co., Ltd.
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihin Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineraloel KG
Kobe Port Service Kabushiki Kaisha
Kurt Ammenn GmbH & Co. K.G.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu Kabushiki Kaisha
Kyokyto Petroleum Overseas, Ltd.
Kyokuto Sekiyu Kogyo Kabushiki Kaisha
Les Nouveaux Comptoirs Petroliers
Les Supermarches De Cote D'Ivoire
Likit Petrol Gazi ve Yakit Ticaret A.S.
Loba Chemie Gesellschaft mbh
Lubricantes del Sur, S.A.
Marceaux & Cie

Matco Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Mobil Ami, S.A.
Mobil Atlas Sociedad Anonima de Capital Variable
Mobil Chemie Belgie N.V. (Mobil Chimie Belge S.A.)
Mobil Comercio, Industria e Servicos Ltda.
Mobil Gaz-Mobil Petrol Gazlari Anonim Sirketi
Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG
Mobil Nile Oil Company
Mobil Oil Cameroun
Mobil Oil Cote d'Ivoire
Mobil Oil Dahomey
Mobil Oil de Mexico, Sociedad Anonima
Mobil Oil Djibouti, S.A.
Mobil Oil Francaise
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Haute Volta
Mobil Oil Holdings, S.A
Mobil Oil Mali
Mobil Oil Maroc
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Philippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Rwanda-Burundi (S.A.R.L.)
Mobil Oil Senegal
Mobil Oil Tchad
Mobil Oil Togo
Mobilrex
Mobil Tunisie

Molinos de Carton y Papel, S.A.
Morem
Mosul Petroleum Company Limited
Motel Rest SA
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation
New Zealand Refining Company Limited, The
New Zealand Synthetic Fuels Corp. Ltd.
New Zealand Synthetic Fuels (Housing) Corporation Limited
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.
Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates
Octel S.A.
Oil Kol (Proprietary) Limited
Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P.T. Arun Natural Gas Liquefaction Company
P.T. Stanvac Indonesia
Paloma Pipe Line Company
Pars Investment Corporation
Pembalta Gas System No. 1 Ltd.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pembalta Gas System No. 5 Ltd.

Pembalta Gas System No. 6 Ltd.
Perretti Petroli S.p.A.
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Petromin-Mobil Yanbu Refinery Company Ltd.
Pipe Line Banal de La Goulette
Plegadizos para la Industria S.A.
Poly Oil Chimie (P.O.C.)
Prespak (Proprietary) Limited
Qatar Petroleum Company Limited
Qualbank, Inc.
Rainbow Pipe Line Company, Ltd.
Randhurst Corporation
Reforestadora Andina, S.A.
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Rohel-Aufsuchungs Gesellschaft mbH
Ruhrgas Aktiengesellschaft
S&M Pipeline Limited
S. A. Ets. George DUBOIS
S.A. Mas & Cie
S.A.M. Lebreton
Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company
Sanwa Kasei Kogyo Kabushiki Kaisha
SARL Garage Pineau
Sarni S.p.A.
Saudi Arabian Maritime Company
Saudi Can Company, Ltd., The

Saudi Chemical Industries Company Limited
Saudi Maritime Company Ltd.
Saudi Tankers Limited
Saudi Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
S.C.I. Du Fonds Du Val
Segher de Mexico, S.A. de C.V.
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
SENERCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
R. Simonnet & CIE
Sociedade Portugal Marrocos SARL
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Agicole Des Entreprises Petrolieres (S.A.D.E.P.)
Societe Alfred Ott & Cie
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Civile de Mustapha
Societe Civile Immobiliere Courcelles-Etoile
Societe Civile Immobiliere de Construction de 34 Avenue du General Leclerc a Boissy-St-Leger
Societe Civile Immobiliere de Construction "La Residence Brune"
Societe Civile Immobiliere du 10 Bd. de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Civile Immobiliere Mobil
Societe Dahomeenne d'Entreposage de Produits Petroliers

Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gaz D'Oceanic (SOGADOC)
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dakar-Yoff
Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe de Maperialx d'Etancheite Pour Le Enterprises (Meple)
Societe d'Enterposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage d'Hydrocarbures de Bingo (SEHBI)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe de Renovation D'Emballages Metalliques (REM)
Societe d'Habitations a Loyer Modere de la Seine Maritime
Societe des Bitumes et Cut-Backs du Cameroun
Societe des Establissements Goux
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-Europeen
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.
Societe Jean Roussel S. A.
Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de Produits

Petroliers
Societe Nationale de Raffinage (Sonara)
Societe Nouvelle Raffinerie Meridionale De Ceresines (RMC)
Societe Novodis
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)
Societe Regionale De Produits Petroliers
Societe Regionale de Produits Energetiques
Societe Tahitienne de Depots Petroliers
Societe Tchadienne D'Entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
SOMODIP
Sonarep (South Africa) (Proprietary) Limited
SONEX
South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
Station-Service Lunes
Sydney Metropolitan Pipeline Pty. Ltd.
Syria Petroleum Company Limited
T.R. Miller Mill Company, Inc.
Tanklagergesellschaft Koln-Bonn
Tecklenburg GmbH
Tecklenburg GmbH & Co. Energiebedarf K.G.
Texoma Pipe Line Company
Thailand Lubricant Products, Limited
Thailand Solvent Products, Ltd.
Thums Long Beach Company
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.
Tonen Energy International Corp.
Tonen Sekiyu Kagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha

Tonen Technology Kabushiki Kaisha
Total Centrafricaine de Gestion (TOCAGES)
Toulouse-Distribution Produits Petroliers
Toyoshina Film Co., Ltd.
Tradewind Maritime Co., S.A.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgas Umschlags-Lager-Und Transport Gesellschaft mbH
Turkish Petroleum Company Limited
Twifo Oil Plantations Ltd.
UBAG Unterflur Betankungsanlage Flughafen Zurich
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Wakohjushi Kabushiki Kaisha
Walton, Gatwick Pipeline Company Limited
Werner Weidemann Mineraloelvertrieb G.m.b.H.
West Shore Pipe Line Company
Wolverine Pipe Line Company
WSG, Warmeservice Gmbh
Wyco Pipe Line Company
Zaire Mobil Oil
Zaire Services Des Entreprises Petroliers

EXXON CORPORATION

In accordance with Rule 28.1 of the Rules of the Supreme Court, Exxon Corporation lists the following subsidiaries and affiliates whose stock or debt securities are publicly traded in the United States or Canada:

Exxon Pipeline Company
Imperial Oil Limited
Reliance Electric Company

GULF OIL CORPORATION

Gulf Oil Corporation's affiliates and/or subsidiaries (other than wholly-owned subsidiaries) are:

A/S Jargul
A/S Jargul and Co. K/S
AB Djurgardsberg
Adela Investment Company, S.A.
Allied-General Nuclear Services
Andogas S.A. (Switzerland)
Asia Polymer Corp.
China Gulf Oil Company Limited
Chinhae Chemical Company, Ltd.
Colonial Pipeline Company
Delaware Bay Transportation Company
Det Gronlandske Olieaktieselskab
Dixie Pipeline Company
Emery Joint Venture
Explorer Pipeline Company
Gulf Canada Limited
Gulf Oil Canada Limited Associated Companies
Gulf Oil Terminals (Ireland) Limited
Gulf Oil Zaire S.A.R.L.
Harshaw-Bryce & Co. Pty. Ltd.-H/FP
Harshaw-Juarez S.A. De C.V.-H/FP
Harshaw-Murata Kabushiki Kaisha-H/FP
Harshaw Galvanotecnia S.A.-H/FP
Harshaw/Filtrol Partnership-H/FP
Hochtemperatur Reaktorbau GMBH
Hong Kong Refueling Company Ltd.
Insco Holding & Finance Company N.V.
Keydril (Nigeria) Limited
Kuwait Oil Company Limited
Laurel Pipe Line Company
Mainline Pipelines Limited
Mid-Valley Pipeline Company
Midwest Carbide Corporation

North River Energy Company
Oil Shippers Service, Inc.
Oklahoma Nitrogen Company
Paloma Pipe Line Company
Pembroke Capital Company
Pembroke Cracking Company
Petrosil Oil Company Limited
Plastigama, S.A.
Plastijal Sociedad Anonima
Platte Pipeline Company
Pyropower Corporation
Raffinerie De Cressier S.A.
Rio Blanco Oil Shale Partnership
Sarni S.P.A.-Refining
Solvent Refined Coal International, Inc.
Sunrise International Company Limited
Svensk Petroleum Administration A.B.
Svensk Petroleum Largring Pre A.B.
Svensk Petroleum Forvalting A.B.
Taita Chemical Corporation
Valley Pines Associates
Venezuela Gulf Refining Company
West Texas Gulf Pipe Line Company

MARATHON PETROLEUM COMPANY
(Formerly Marathon Oil Company)
(interests of 5% or greater)

A & G Transportation Company
Airport Company of Hilton Head Island, Inc., The
Alaska Transportation Service Company
Altos Hornos de Vizcaya
American Bridge International, Inc.
Apollo Gas Company
Arctic LNG Transportation Company
Arcturus Mines Ltd.
Associated Manganese Mines of South Africa, Ltd.

Associated Ore & Metal Corporation, Ltd.
Athlone Prospecting & Development Corporation, Ltd.
Avsteel SWA, Ltd.
Badger Pipe Line Company
Bartow Chemical Products
Belleview Biltmore Country Club Corporation
Belleview Management Company, Inc.
Belleview Plaza West Corporation
Belleview Realty, Inc.
Bessemer and Lake Erie Railroad Company
Birmingham Southern Railroad Company
Blue Grass Phosphate Company
Brazaco-Mapri Industrias Metalurgicas S.A.
CLAM Petroleum Company
Carbon County Railway Company
Carnegie Natural Gas Company
Cartier Railway Company
Central Radio Telegraph Company
Century III Associates
Chrome Deposit Corp. (Court Holdings J.V.)
City Point Oil Terminal, Incorporated
Compagnie Miniere de l'Ogooue
Compagnie de Gestion de Mifergui-Nimba, Ltee.
Companhia Meridional de Mineracao
Companhia Siderurgica Paulista "Cosips"
Compania Minera Marathon, Ltd.
Cook Inlet Pipe Line Company
Cygnus Mines, Ltd.
Deepsea Ventures, Inc.
Deutsche Marathon Explorations GmbH
Deutsche Marathon Pet. GmbH
Deutsche Transalpine Olleitung GmbH
Duluth, Missabe and Iron Range Railway Company
ECOL Inc. (A Mississippi Corporation)
Ecuadorian Offshore Corporation
Elgin, Joliet and Eastern Railway Company

Essex Minerals Company
Explorer Pipeline Company
FHS Automotive Parts Manufacturing Ltd.
FHS Stahlverformung GmbH
Feralloys Limited
Findlay Aviation Services, Inc.
Fort Meade Chemical Products
GCI, Inc.
Globe Oil Company, U.S.A.
Gravcap, Inc.
Green Bay Terminal Corporation
Guard-All Building Materials Company, Inc.
Hancock Shipping Company, Limited
Hart-Jaune Power Company
Hilton Head Management Co., Inc.
ITW-Mapri (51% owned by Brazaco-Mapri)
Industria de Tubos y Perfiles, S.A. (Intupersa)
Interocean Oil Colombia, Inc.
Interocean Oil Company, Inc.
Johnstown and Stony Creek Railroad Company
Jupiter Mining and Prospecting Co. (Pty) Ltd.
Kappa Mining & Prospecting Co., Ltd.
Kenai LNG Corporation
LOCAP Inc.
LOOP Inc.
La Pointe Iron Company
Lake Terminal Railroad Company, The
Lighthouse Realty, Inc.
Live Oak Uranium Operations
Macalister Coal Pty. Ltd.
Mahoning Ore & Steel (Partnership)
Marathon Development Norway, Ltd.
Marathon Espanola de Petroleos, S.A.
Marathon Exploration Tunisia, Ltd.
Marathon International Pet. (G.B.) Limited
Marathon International Pet. Supply Company

Marathon International S.A.
Marathon Mining Ireland, Ltd.
Marathon Oil Company
Marathon Pet. (G.B.) Limited
Marathon Pet. (Netherlands Antilles) N.V.
Marathon Pet. Amazonas, Ltd.
Marathon Pet. Angola, Ltd.
Marathon Pet. Argentina, Ltd.
Marathon Pet. Australia, Ltd.
Marathon Pet. Bolivia, Ltd.
Marathon Pet. Brasul, Ltd.
Marathon Pet. Brazil, Ltd.
Marathon Pet. Burma, Ltd.
Marathon Pet. Colombia, Ltd.
Marathon Pet. Company (Ireland) Limited
Marathon Pet. Ecuadorian, Ltd.
Marathon Pet. Egypt, Ltd.
Marathon Pet. Expl., Ltd.
Marathon Pet. Germany, Ltd.
Marathon Pet. Ghadames, Ltd.
Marathon Pet. Guatemala, Ltd.
Marathon Pet. Honduras, Ltd.
Marathon Pet. Indonesia, Ltd.
Marathon Pet. Ireland, Ltd.
Marathon Pet. Irian Jaya, Ltd.
Marathon Pet. Italy, Ltd
Marathon Pet. Kenya, Ltd.
Marathon Pet. Libya, Ltd.
Marathon Pet. Natuna, Ltd.
Marathon Pet. Netherlands Antilles, Ltd.
Marathon Pet. Netherlands, Ltd.
Marathon Pet. Norte Brazil, Ltd.
Marathon Pet. North Sea (G.B.) Limited
Marathon Pet. Pakistan, Ltd.
Marathon Pet. Paraguay, Ltd.
Marathon Pet. Peru, Ltd.

Marathon Pet. Philippines, Ltd.
Marathon Pet. Santos, Ltd.
Marathon Pet. Senegal, Ltd.
Marathon Pet. Siri, Ltd.
Marathon Pet. Spain, Ltd.
Marathon Pet. Sri Lanka, Ltd.
Marathon Pet. Sudan, Ltd.
Marathon Pet. Syria, Ltd.
Marathon Pet. Thailand, Ltd.
Marathon Pet. Tomori, Ltd.
Marathon Pet. Tunisia, Ltd.
Marathon Pet. Turkey, Ltd.
Marathon Pet. U.K., Ltd.
Marathon Pet. Venezuela, Ltd.
Marathon Pet. Viet-Nam, Ltd.
Marathon Pet. Zarzis, Ltd.
Marathon Petroleum Company
Marathon Petroleum Company (Norway)
Marathon Petroleum Norge A/S
Marathon Service (G.B.) Limited
Marathon Servicos de Expl. e Desenvolvimento Ltda.
Marine Transfer, Inc.
Mattheis (100% owned by Brazaco-Mapri)
McKeesport Connecting Railroad Company
Mecania Walsywa LTDA.
Met-Chem Canada, Inc.
Mineracao Buritirama Ltds.
Mineracao Carajas, Ltds. (Partnership)
Mineracao Maraba, Ltds. (Partnership)
Mineracao Xingu, Ltds. (Partnership)
Minerals Ordaz C.A.
Mobile (I-65) Superstructure-Joint Venture
Mon-Valley Transportation Company
Morrison-Knudsen, Fishback & Moore
Morrison-Knudsen, Fishback & Moore
Morrison-Knudsen, Fishback & Moore

Natkin and Company
Navios Corporation
Navios Ship Management Services, Inc.
Navios Shipholding Inc.
Newburgh and South Shore Railway Company, The
North Carolina Lime, Inc.
Northern Tier Pipeline Company
Oasis Oil Company of Libya, Inc.
Ocean Mining Associates-Joint Venture
Ohio Barge Line, Inc.
Oil Insurance Limited
Oil Shippers Service, Inc.
Old Main Assurance Ltd.
Oresteel Investments (Proprietary) Limited
Orinoco Mining Company
P.T. Pacific Nikkel Indonesia
Pan Ocean De La Rep. Dominicana Ltd.
Pan Ocean Exploration, Inc.
Pan Ocean Niger, Ltd.
Pan Ocean Oil Corp. (Abu Dhabi)
Pan Ocean Oil Corp. (Ecuador)
Pan Ocean Oil Corp. (Indonesia)
Pan Ocean Oil Corp. (Maldive Is.)
Pan Ocean Oil Corp. (Thailand)
Pan Ocean Pet. Netherlands, Ltd.
Pasadena Yacht and Country Club Corporation
Paschen Contractors-Morrison-Knudsen
Pennzoil do Brazil, Ltd.
Petroleum Terminals, Incorporated
Pilot Oil Corporation
Pittsburgh & Conneaut Dock Company, The
Platte Pipe Line Company
Polar LNG Shipping Corporation
Port Oil Inc.
Prieska Copper Mines (Proprietary) Limited
Qualbank, Inc.

Quebec Cartier Mining Company
RMI Company
Rama Sapyakorn Patana Ltd.
Richland Corporation
River & Gulf Transportation Company
Rockland Joint Venture
Russell Stewart Oil Co.
Seven Springs Country Club, Inc.
Sidbec-Normines Incorporated
Sigma Mining & Prospecting Co. (Pty.) Ltd.
Societa Italiana Per l'Oleodotto Transalpino, S.p.A.
Swedcast Canada Limited
TEN/USS Joint Venture
TEX/USS Joint Venture
Termerid Mineracao, SA
Terninoss Acciai Inossidabili, S.p.A.
Theta Mining & Prospecting Company (Pty.) Ltd.
Tideland Realty of Hilton Head, Inc.
Tideland Realty of Ohio, Inc.
Tideland Timesharing, Inc.
Tilden Iron Mining Company
Torremco Soc. Min. E. Com. Ltds.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich GmbH
U-Save, Inc.
U.S. Steel Credit Corporation
U.S. Steel International of Canada, Ltd.
U.S. Steel Mining Co., Inc.
U.S. Steel Overseas Capital Corporation
U.S. Steel Overseas Finance Corp. N.V.
U.S. Steel Pipeline Co., Inc.
USS Consultants, Inc. (Ohio)
USS Engineers and Consultants, Inc.
USS Great Lakes Fleet Services, Inc.
USS Great Lakes Fleet, Inc.
USS Lake Transport, Inc.

USS MaxTech Company (Japan), Ltd.
USS MaxTech Company, Inc.
USS MaxTech Company, Ltd.
USS Oilwell Supply Co., International, Inc.
USS Oilwell Supply Co., Ltd.
USS Oilwell Tubular, Inc.
USS Portfolio, Inc.
USS Seaway Transport, Inc.
USS Technology (Japan), Ltd.
USS, Inc.
USS-OCF-W&M Joint Venture
USSAC, Inc.
Union Railroad Company
United States Steel Communications Co.
United States Steel Consultants, Inc. (Ohio)
United States Steel Corporation
United States Steel Export Company de Mexico, S.A.
United States Steel International, Inc.
United States Steel International (Overseas) Limited
United States Steel International Sales Company
Warrior & Gulf Navigation Company
West Shore Pipe Line Company
West Union Canal Company, The
Wolverine Industrial Development Corporation
Wolverine Pipe Line Company
Wyoming Industrial Development Corporation
Zeerust Chrome Mines, Limited
Zeta Mining & Prospecting Co. (Pty.), Ltd.
Zuari Agro Chemicals Limited
Zululand Titanium (Pty.), Ltd.

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No. 83-1515

In the Supreme Court of the United States

OCTOBER TERM, 1983

MOBIL OIL CORPORATION, ET AL, PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly declined to invalidate a petroleum price control regulation issued nearly 10 years ago and rescinded more than three years ago after concluding that the agency had "good cause" for dispensing with notice and an opportunity to comment at the time the regulation was promulgated.

2. Whether, assuming arguendo that the regulation at issue was procedurally invalid when first promulgated in September 1974, the court of appeals correctly held that the regulation was validly repromulgated in December 1974 following a new notice and comment rulemaking.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

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v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A45) is reported at 728 F.2d 1477. The opinion of the district court (Pet. App. A46-A91) is reported at 547 F. Supp. 1246.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1983 (Pet. App. A114). A petition for rehearing was denied on February 10, 1984 (Pet. App. A115). The petition for a writ of certiorari was filed on March 12, 1984. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, and 28 U.S.C. 1254(1).

STATEMENT

This case concerns petitioners' belated attack on the procedural validity of the so-called "deemed recovery" rule, one of the principal regulations of the petroleum price control program administered by the Department of Energy [1] until controls were terminated on January 28, 1981.[2] Although the deemed recovery rule was promulgated in September 1974, petitioners did not challenge it until 1979. Moreover, not until 8 years after promulgation of the rule, and nearly two years after the end of the price control program, did the district court retroactively invalidate the rule on procedural grounds. During the interim years, literally billions of transactions took place in reliance on the rule, which had been promulgated primarily to protect smaller, independent companies against price discrimination by larger refiners. The court of appeals reversed the district court's invalidation of the rule, holding that it was validly promulgated in September 1974 and, in the alternative, that it was validly repromulgated in December 1974.

1. In November 1973, after the Arab oil embargo caused imported oil prices to rise sharply, Congress

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[1] As used in this brief, "DOE" or "agency" refers to the Department of Energy and the predecessor agencies that administered the petroleum price control program, the Federal Energy Administration, the Federal Energy Office, and the Cost of Living Council.

[2] Petroleum price controls were first promulgated by the Cost of Living Council on August 22, 1973 (38 Fed. Reg. 22536 (1973)), and were terminated by President Reagan on January 28, 1981 (Exec. Order No. 12,287, 46 Fed. Reg. 9909 (1981)).

enacted the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. 751 *et seq.*[3] Regulations promulgated under the EPAA established limitations on the maximum prices that could be charged for sales of covered products.[4] The most important regulatory concept at issue here is the principle of "equal application." This principle was the cornerstone of all of the agency's refiner pricing regulations. Simply stated, "equal application" was designed to ensure that refiners did not discriminate among classes of purchasers (*i.e.*, refiner-owned service stations versus independents) or among regions of the country. The equal application concept was initially promoted by structuring the refiner price rule in such a way that refiners had to maintain their historical price differentials between classes of purchasers whenever they increased prices. See Pet. App. A5-A6. In other words, if a refiner historically charged independents 10 cents less per gallon than it charged its own service stations, any allowable price increases had to maintain that ten-cent differential.[5]

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[3] Authority to promulgate regulations and issue orders under the EPAA expired on September 30, 1981 (15 U.S.C. 760g), but the expiration of that authority did not affect pending cases or the authority to bring new actions based on transactions occurring prior to the expiration date (*ibid.*).

[4] The decision of the court of appeals provides a detailed description of the regulatory framework within which this litigation arose (Pet. App. A4-A13).

[5] If refiners had not been required to maintain their customary price differentials, they would have been able to drive their independent retail competitors out of business by pricing products to them at higher prices than the refiners charged their own retail customers. One of Congress's primary concerns in enacting the EPAA, however, was "to preserve the

2. The "deemed recovery" rule, at the heart of this litigation, was first promulgated in September 1974. 39 Fed. Reg. 32306 (1974). The need for the rule arose when gasoline supplies began increasing and refiners found themselves in a position to sell their products at prices below so-called "base prices" (referred to hereafter for ease of understanding as maximum lawful prices). Because the equal application concept had first been put into the regulations at a time when refiners had no incentive to lower their prices to any of their customers, the agency had not expressly specified that the equal application rules applied to sales *below* maximum lawful prices as well as to sales *at* maximum lawful prices. Thus, the intent of the regulations was ambiguous when selling prices for covered products were below maximum prices, since the refiner price rule did not expressly require refiners either to charge the maximum lawful prices or to apply equally their increased product costs in setting prices that were below the maximum prices. See Pet. App. A6. The result was that some refiners began interpreting the price regulations as allowing them to discriminate among their customers by selectively charging prices below maximum lawful prices to some customers, while charging other customers the maximum lawful price. See 39 Fed. Reg. 32307 (1974).

The deemed recovery rule was designed to correct this situation by making the equal application con-

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competitive viability" of the independent sector. See 15 U.S.C. 753(b)(1)(D). In addition, Congress wanted to ensure equitable distribution and equitable prices among all regions of the country (15 U.S.C. 753(b)(1)(F)), and the equal application principle fostered that goal as well.

cept explicitly applicable to all price changes, whether below or at maximum prices. Pet. App. A9. The rule did not make equal application mandatory, but it created a strong economic incentive to maintain historical price differentials by providing that a refiner would be "deemed" to have recovered the highest price increase charged to any class of purchaser from *all* classes of purchasers. *Id.* at A10-A11. Thus, if a refiner passed through increased costs of five cents to one customer, but only three cents to another customer, it would be deemed to have passed through five cents of increased costs to both customers.

The deemed recovery rule was promulgated on September 5, 1974, without prior notice and comment. 39 Fed. Reg. 32306 (1974). The agency found "good cause" for dispensing with notice and comment because advance announcement of a proposed deemed recovery rule, followed by a comment period, would only alert those refiners who had not previously been aware of the ambiguity in the regulations to its existence, thereby encouraging them to enter into long-term contracts in violation of the equal application principle during the pendency of the rulemaking. *Id.* at 32307.[6] Accordingly, the agency announced

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[6] For example, Texaco stipulated, in litigation challenging the validity of the deemed recovery rule, that prior to September 1, 1974, it had construed the regulations as requiring equal application of costs in selling prices below maximum lawful prices. *Texaco, Inc.* v. *Dep't of Energy*, C.A. No. 80-18 (D. Del. Feb. 4, 1982) (R. 1155). The agency did not want to alert such companies to the possibility that equal application was not required, for at least some of them might well have undertaken predatory activities. Indeed, even after the rule was promulgated, Texaco proceeded to engage in discriminatory pricing against west coast independents. See *McWhirter Distributing Co.* v. *Texaco, Inc.*, 668 F.2d 511 (Temp. Emer. Ct. App. 1981).

that written and oral comments on the deemed recovery rule would be accepted in public hearings to be held later in September. *Ibid.*

Five days later, on September 10, 1974, the agency published a notice of proposed rulemaking containing numerous proposals to revise the price regulations. 39 Fed. Reg. 32718 (1974). In that notice, the agency proposed replacing its equal application rules, including the deemed recovery rule, with a package of amendments extending to refiners greater pricing flexibility than was provided by the deemed recovery rule, while continuing to protect independents in other ways. *Id.* at 32722-32723. The notice solicited comments on the agency's proposed amendments and, by reference, on the deemed recovery rule they would replace. *Ibid.*

On December 5, 1974, after receiving 1,500 pages of comments and oral testimony on both the September 5 and September 10 notices, the agency issued several regulatory amendments. 39 Fed. Reg. 42368 (1974). With respect to the proposal to replace the deemed recovery rule with an alternative that would have permitted greater pricing flexibility, the agency announced that it was deferring action "until a later date." *Ibid.* The agency thus repromulgated the September 5 deemed recovery rule as part of the overall refiner pricing rule effective December 5, 1974. *Id.* at 42372.

3. On March 5, 1975, the Senate Committee on Interior and Insular Affairs favorably reported to the full Senate a bill amending and extending the EPAA. The bill was enacted on December 22, 1975, as the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871. The committee's report on the bill addressed amendments considered but rejected by the

committee, including one amendment that would have made equal application of increased costs a statutory requirement. After hearing testimony on the need to maintain and enforce customary price differentials (see, *e.g.*, *Standby Energy Authorities Legislation: Hearing on S. 620 and 622 Before the Sen. Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 134-135 (1975)), the committee rejected this proposed amendment. The committee's reasons were two: the amendment's stated goal of ensuring "the maintenance of customary differentials in price" already was required by the "purpose and intent" of the EPAA, and the refiner pricing regulations already in effect accomplished that statutory goal. S. Rep. 94-26, 94th Cong., 1st Sess. 37-38 (1975).[7]

4. a. Although the deemed recovery rule was promulgated in 1974, petitioners did not file suit to overturn the rule until 1979, when the price control program was winding down. Petitioners then waited until October 1981, a month after the expiration of the EPAA, which was the agency's sole statutory authority for promulgating the challenged rule, to file a

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[7] Although the committee in its report did not refer to the "deemed recovery rule" by name, that rule was the agency's only regulation providing for the maintenance of customary price differentials when selling prices were below maximum lawful prices. Thus, the committee's reference to the agency's "regulations providing for the maintenance of relative price differentials among classes of purchaser" (S. Rep. 94-26, *supra*, at 38) was plainly a reference to the deemed recovery rule.

The House of Representatives also was aware that the deemed recovery rule had been promulgated but did not seek to alter or rescind it. See H.R. Rep. 94-340, 94th Cong., 1st Sess. 51-52 (1975).

motion for summary judgment.[8] The United States District Court for the Northern District of New York first rejected the agency's defense of laches. The court then invalidated the deemed recovery rule based on its conclusion that there was no emergency in September 1974 and that even if the agency's publication of prior notice would precipitate injury to the public welfare, that fact would not justify the agency's waiver of notice and comment procedures. Pet App. A88-A89. The court also rejected DOE's argument that the rule was validly repromulgated on December 5, 1974, because it felt that the September 10 notice of proposed rulemaking had not adequately informed interested persons that the agency was interested in reevaluating the rule (*id.* at A89-A90).

b. Naph-Sol Refining Company, the respondent in No. 83-1509, filed suit against Murphy Oil Corporation in January 1979 to recover overcharges under Section 210 of the Economic Stabilization Act, 12 U.S.C. (1976 ed.) 1904 note. Murphy's defense included a claim that the deemed recovery rule had been improperly promulgated and was void ab initio. Shortly after the district court in the present action issued its decision in favor of petitioners, the United States District Court for the Western District of Michigan granted summary judgment to Murphy.

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[8] Ironically, petitioner Mobil had previously persuaded another judge of the same district court to invalidate a New York state tax statute because of a conflict with the deemed recovery rule. *Mobil Oil Corp.* v. *Tully*, 499 F. Supp. 888 (N.D. N.Y. 1980), aff'd, 653 F.2d 497 (Temp. Emer. Ct. App. 1981), vacated and remanded on other grounds, 455 U.S. 245 (1982). Thus, Mobil's action here is an attempt to persuade the courts to declare the deemed recovery rule void ab initio after persuading the same courts to declare the New York statute void because it conflicted with the deemed recovery rule. See Pet. App. A23 n.15.

Like the district court here, the court held that no emergency existed in September 1974 sufficient to justify the agency's use of "good cause" rulemaking procedures. *Naph-Sol Refining Co.* v. *Murphy Oil Corp.*, 550 F. Supp. 297 (W.D. Mich. 1982) (Pet. App. A106-A107). The court also invalidated the rule as repromulgated on December 5, 1974, because in its view the preamble did not include an adequate statement of the basis and purpose of the rule. *Id.* at A110.

5. The court of appeals consolidated the two district court decisions and reversed both of them. Pet. App. A1-A45.[9] TECA first concluded that the defense of laches was available to the agency in the instant case and further observed that (*id.* at A23 (footnote omitted)):

> Many of DOE's arguments with respect to delay and prejudice, on their face, are impressive. First, and most significantly, is the obvious fact that Mobil's procedural challenge is brought some five years after the fact of promulgation. Mobil and other oil companies promptly challenged other regulations issued at essentially the same time as the deemed recovery rule and there has been no satisfactory explanation of why, in this case, there was a delay. This is particularly significant here since the judicial review provision in § 211 of the Economic Stabilization Act, 12 U.S.C. § 1904 note, was expressly designed to ensure prompt review of agency action. *See* S. Rep. No. 92-507, 92nd Cong., 1st Sess., *reprinted*

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[9] DOE participated in the court below as amicus curiae in support of Naph-Sol's position (Pet. App. A3). Because the issues raised by Murphy in No. 83-1509 are so closely related to those raised by petitioners here, we address in this response the contentions advanced in both petitions.

> *in* 1971 U.S. Code Cong. & Ad. News 2283, 2292-93.
>
> The apparent effects of the delay are considerable. DOE would now be unable to cure any procedural [infirmity] by repromulgating the deemed recovery rule. It is arguable that invalidation at this juncture would run afoul of congressional intent with respect to petroleum pricing in the period of controls. There is some evidence that Congress never explicitly enacted equal application legislation because, in part, the deemed recovery rule existed. *See* S.Rep. No. 94-26, 94th Cong., 1st Sess. 37-38 (1975). Moreover, invalidation could be seen as prejudicing those refiners who had set their prices in accordance with the rule. Finally, the lost time and expense of DOE's ongoing enforcement actions is to be considered.

Nevertheless, TECA did not rest its decision in this case on laches because it concluded that Murphy, in the consolidated private action, was entitled to raise the alleged invalidity of the deemed recovery rule as a defense to Naph-Sol's action for overcharges. Pet. App. A24. Accordingly, TECA proceeded to address the merits in both cases. It affirmed the procedural validity of the September 5 deemed recovery rule, holding that, both as a matter of law and fact, the agency had good cause under the Administrative Procedure Act, 5 U.S.C. 553(b)(B), and the Federal Energy Administration Act, 15 U.S.C. (1976 ed.) 766(i)(1)(B), for waiving prior notice and comment (Pet. App. A25-A34). TECA held that if an agency reasonably concludes that the announcement of a proposed rule itself could precipitate significant harm to the public welfare, good cause exists to waive prior notice and opportunity to comment (*id.* at

A29). And, after reviewing the record, TECA concluded that it was "unable to say that the [agency's] judgment that notice would lead to price discrimination and pressure on independents and regions was unreasonable" (*id.* at A31).

TECA also upheld the procedural validity of the deemed recovery rule as repromulgated on December 5, 1974. It found that the September 10 notice of proposed rulemaking was adequate to alert interested parties that the deemed recovery rule was under review and that the agency was willing to reevaluate the rule (Pet. App. A36). Finally, the court held that the agency's statement of basis and purpose for the December 5 rule was adequate to permit the court to discern the agency's path (*id.* at A39). Although acknowledging that the statement was not a model of clarity, TECA was "disinclined, some eight years after the event, to invalidate a rule on the technical ground of a deficient statement of basis and purpose when we can fairly discern the agency's aim" (*ibid.*).[10]

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. The issues are unlikely to recur, since TECA has decided only narrow questions concerning the procedural validity of an emergency regulation promulgated nearly 10 years ago in the

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[10] Subsequent to TECA's decision, two district courts have issued decisions upholding the substantive and procedural validity of the deemed recovery rule as promulgated on September 5, 1974. *Go-Tane Service Stations, Inc.* v. *Clark Oil Refining Corp.*, No. 79-C-1674 (N.D. Ill. Jan. 16, 1984); *Martin Oil Service, Inc.* v. *Koch Refining Co.*, No. 81-C-1844 (N.D. Ill. Feb. 1, 1984).

formative period of an emergency oil price control program that was terminated more than three years ago. Moreover, as this Court has observed, TECA was established by Congress to ensure expert and uniform treatment of energy issues, and it is "a court intimately familiar with the intricacies of federal energy regulation." *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982). TECA carefully and thoroughly considered petitioners' arguments, and it rejected them in a thoughtful, unanimous decision. In these circumstances, further review is unwarranted.

1. Petitioners urge that the agency was not justified in waiving notice and opportunity to comment on the September 5 deemed recovery rule (Pet. 9-17; 83-1509 Pet. 17-19). But the general notice and comment requirements of the APA may be waived "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" (5 U.S.C. 553(b)(B)). Similarly, the notice and comment requirements of the Federal Energy Administration Act (FEAA) may be waived when strict compliance would "cause serious harm or injury to the public health, safety, or welfare" (15 U.S.C. (1976 ed.) 766(i)(1)(B)). TECA's decision with respect to the procedural requirements of the FEAA, however, is of purely academic interest since those procedural provisions were repealed in 1977, prior to the institution of this action (see Pub. L. No. 95-91, § 709(a), 91 Stat. 608), and replaced with a requirement for showing only a likelihood of such adverse effects (see 42 U.S.C. (Supp. V) 7191(e)). In any event, even as they apply to the APA, petitioners' contentions are without merit.

a. TECA correctly concluded that the agency validly promulgated the deemed recovery rule in September 1974 without prior notice and opportunity to comment because of the agency's conclusion that a notice of proposed rulemaking advertising the gap in the agency's equal application requirements threatened to precipitate the very discriminatory pricing that Congress directed the agency to foreclose by appropriate regulations (see page 4 note 5, *supra*). Petitioners do not seriously dispute the proposition that regulations may be promulgated without prior notice and opportunity to comment under the "good cause" exception of the APA when such prior notice would precipitate conduct by regulated parties that is "contrary to the public interest." As TECA has held in the past, good cause exists when an announcement of future regulations might itself cause the very harm the regulations were intended to avert. *Nader* v. *Sawhill*, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975); *DeRieux* v. *Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App.), cert. denied, 419 U.S. 896 (1974); see also *Metzenbaum* v. *Edwards*, 510 F. Supp. 609, 613 (D.D.C. 1981).[11] TECA's con-

[11] In *Nader* v. *Sawhill*, TECA upheld the agency's waiver of notice and comment because " 'the announcement of a price increase [in the "old oil" ceiling price] at a future date could have resulted in producers withholding crude oil from the market until such time as they could take advantage of the price increase' " (514 F.2d at 1068 (citation omitted)). In *DeRieux* v. *Five Smiths*, TECA upheld the President's failure to provide advance notice and comment when he promulgated a 90-day freeze on prices, rents, wages, and salaries because, "[h]ad advance notice issued, it is apparent that there would have ensued a massive rush to raise prices and conduct 'actual transactions'—or avoid them—before the freeze deadline" (499 F.2d at 1332).

clusion fits comfortably within the plain language of the APA permitting waiver of notice when "the agency for good cause finds * * * that notice and public procedure thereon are * * * contrary to the public interest." [12]

b. Petitioners' disagreement with the decision below is, in reality, a disagreement with TECA's conclusion that the facts available to the agency in 1974 supported the agency's predictive judgment that prior notice "would lead to price discrimination and pressure on independents and regions" (Pet. App. A31). But the agency's conclusion involved, as TECA noted, "subjective" judgments entitled to "special deference," involving as they did deductions based on the agency's "expert knowledge" (Pet. App. A30-A31). TECA's approach follows this Court's teachings that heightened judicial deference is to be accorded agency judgments on economic matters so long as the agency acts reasonably. See, *e.g.*, *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 169-170 (1982); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413-414 (1958); *Board of Trade* v. *United States*, 314 U.S. 534, 548 (1942); cf. *Baltimore Gas & Elec-*

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[12] Petitioners suggest (Pet. 15; 83-1509 Pet. 18-19) that the agency should have announced a proposed rule that, if promulgated after notice and comment, would take effect retroactively as of the date of the initial announcement. Petitioners would require the agency to proceed in this manner even if the agency finds good cause to waive notice and comment, thereby effectively repealing the good cause exception in the APA and replacing it with their own alternative procedure. As TECA noted (Pet. App. A32-A33 n.21), such additions to the procedural requirements of the APA are forbidden by this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

tric Co. v. *Natural Resources Defense Council, Inc.*, No. 82-524 (June 6, 1983) (deferring to expert scientific prediction made by the Nuclear Regulatory Commission). Such a deferential standard of review is particularly appropriate in this case, where petitioners are asking the courts to substitute their economic judgment for the one the agency made 10 years ago. As TECA explained (Pet. App. A31):

> Although September 1974 was a period of increasing oil supply, it was still a volatile time, not that far removed from the Arab oil embargo of fall 1973, and far distant from the relative stability in the oil market of 1979 or 1983. Given the changed market conditions in late summer 1974, the relatively recent awareness that this was encouraging selective cost banking, and the policy of preserving the class of purchaser scheme, we are unable to say that the [agency's] judgment that notice would lead to price discrimination and pressure on independents and regions was unreasonable. It is easy, in retrospect, to state that [the agency's] fears were exaggerated. [The agency], however, was in a better position in August 1974 to appreciate the economic dynamics of the oil industry at that time than the courts are today; we must avoid being hampered by 20/20 hindsight.

Moreover, as TECA correctly noted, the agency's predictive judgment was clearly supported by events at the time (Pet. App. A32 (footnote omitted)):

> None of the oil companies, who were not reluctant to challenge regulations, rejected the [agency's] good cause argument by attacking the procedural validity of the deemed recovery rule in 1974 or 1975. This gives some credence to the [agency's] predictive judgment and finding of

> good cause. So, too, do the numerous comments independents submitted to the [agency] in response to the [agency's] concern that independents and regions were susceptible to discriminatory pricing.

In short, petitioners' disagreement with TECA's assessment of the facts confronting the agency 10 years ago presents no issue requiring this Court's review.[13]

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[13] Petitioners argue (Pet. 13; 83-1509 Pet. 20-21) that the deemed recovery rule was superfluous because protection from discrimination already was afforded both by a general anti-discrimination provision in the agency's regulations (10 C.F.R. 210.62(b) (1975)) and by the federal antitrust laws. But notwithstanding the existence of such general prohibitions against discriminatory pricing, Congress expressly directed the agency to guard against discriminatory pricing in the sale of oil (see page 4 note 5, *supra*). Accordingly, it is not surprising that TECA declined to second guess the agency's conclusion that in the circumstances prevailing in 1974, general prohibitions against discriminatory pricing were insufficient to protect the public interest.

Petitioners also fault TECA for reviewing the adequacy of the September 5 statement of good cause in the light of the September 10 notice of proposed rulemaking (Pet. 14-15; 83-1509 Pet. 14-17). But the basic statement that the agency was adopting the deemed recovery rule without prior notice in order to avoid precipitating price discrimination was clearly expressed in the September 5 notice. 39 Fed. Reg. 32307 (1974). The September 10 notice merely discussed the pros and cons of the rule and noted that the rule served to protect both independents and regions of the country from price discrimination. *Id.* at 32722-32723. Accordingly, TECA correctly concluded that "[t]he September 10 notice was a contemporaneous statement of the agency's views, and not within the 'made for litigation' rationalization proscribed by *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)" (Pet. App. A33).

2. TECA's holding that the agency satisfied the "good cause" standard for waiving notice and comment on the September 5 rule fully disposes of this case. Nevertheless, TECA also held, in the alternative, that the deemed recovery rule was validly repromulgated on December 5, 1974, *after* notice and opportunity to comment. This rulemaking, which was announced in the September 5 rulemaking and the September 10 notice of proposed rulemaking, featured a 30-day comment period and three days of oral hearings that resulted in 1,500 pages of written and oral comments, including comments from all of the petitioners (see Pet. App. A36 n.24).

a. In the September 10 notice, the agency devoted considerable effort to outlining various options for replacing or modifying all of its equal application regulations, including the deemed recovery rule. The agency solicited comments on these proposals, including a proposal to withdraw the deemed recovery rule and to allow unequal allocation of cost increases within recognized marketing areas, provided that independents be given most favored customer treatment (39 Fed. Reg. 32727 (1974)), and a proposal to allow up to 10% of costs to be allocated unequally *among* regions (*ibid.*). The September 10 notice easily satisfied the APA's requirement that the notice include "either the terms or substance of the proposed rule or a description of the subjects and issues" (5 U.S.C. 553(b)(3)). Moreover, since the agency published notice of the exact terms of the proposed rules, the notice also satisfied the FEAA's requirement that notice "shall be given by publication of [the] proposed rule." 15 U.S.C. (1976 ed.) 766(i)(1)(B).

Nonetheless, petitioners appear to contend (Pet. 17) that regardless of the adequacy of the "notice and public procedure thereon," an agency can *never* repromulgate a rule if the original promulgation was procedurally defective. This novel argument finds no support whatsoever in the express terms of the APA or the FEAA, which set forth the only procedural requirements that the agency must satisfy. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Moreover, petitioners' argument is wholly illogical, since it would mean that an agency can never cure procedural defects in a rule even if it concludes, after hearing all the evidence, that the rule is the most appropriate solution to the problem at hand. Nor is petitioners' argument supported by any of the cases they cite (Pet. 17-18), which merely hold that notice and comment proceedings after the adoption of a rule are insufficient to validate the rule retroactively. The cases say nothing about the issue here, which is whether a rule may be repromulgated on a purely prospective basis after notice and comment. Thus, the only effect of TECA's alternative holding is that a valid deemed recovery rule was promulgated on December 5, 1974, even if the September 5, 1974 rule was invalid.

Petitioners also contend (Pet. 18) that the September 10 notice reflected an unwillingness on the part of the agency to reevaluate the deemed recovery rule; petitioners rely on the notice's statement that "to the extent that the current requirement serves to protect the independent sector of the market, [the agency] has concluded that it must be retained" (39 Fed. Reg. 32723 (1974)). When this statement is read in context, however, it becomes clear, as TECA correctly concluded, that the statement merely "re-

veal[ed] that the [agency] indeed was committed to protecting independents" in some fashion (Pet. App. A36). Indeed, even petitioners admit (Pet. 18) that the agency's proposed regulations published along with the September 10 notice would have deleted the deemed recovery rule entirely (see Fed. Reg. 32726-32731 (1974)). Finally, as TECA held, review of the comments filed in response to the September 10 notice "convinces us that interested parties did not believe that the [agency's] mind was closed" (Pet. App. A36). In short, petitioners had ample opportunity to urge the repeal of the rule, and the agency evidenced complete willingness to consider their arguments.

b. TECA's holding that the agency's statement of basis and purpose accompanying the December 5 repromulgation of the deemed recovery rule was adequate does not warrant review by this Court. The basis and purpose of the rule—Congress's mandate that there be no price discrimination—has been evident to all since the fall of 1974. Indeed, petitioners themselves acknowledge that the purpose of the rule was crystal clear (Pet. 3-4; see also 83-1509 Pet. 6-7).

As TECA noted (Pet. App. A39), the September 10 notice of proposed rulemaking "canvassed in some detail the opposing policy considerations involved" in the decision to repeal or retain the deemed recovery rule. Thus, despite the brevity of the December 5 statement of basis and purpose, the agency's "reason for retaining the deemed recovery rule [was] reasonably clear: the agency concluded that the needs of regions and independents outweighed the benefits of price flexibility" for refiners (*ibid.*).

All of the purposes of a statement of basis and purpose as required by the APA, 5 U.S.C. 553(c), were served in this case. Affected parties understood

the agency's rationale for the rule, and the agency's statements and the administrative record furnished ample material for adequate judicial review (see Pet. App. A37-A39). See *Action on Smoking & Health* v. *CAB*, 699 F.2d 1209, 1215-1216 (D.C. Cir. 1983); *Baltimore & Ohio Chicago Terminal R.R.* v. *United States*, 583 F.2d 678, 687-688 (3d Cir. 1978), cert. denied, 440 U.S. 968 (1979); *Tabor* v. *Joint Board for Enrollment of Actuaries*, 566 F.2d 705, 710 (D.C. Cir. 1977). Moreover, the statement of basis and purpose may be brief and general, *New York Foreign Freight Forwarders & Brokers Ass'n* v. *Federal Maritime Comm'n*, 337 F.2d 289, 296 (2d Cir. 1964), cert. denied, 380 U.S. 910 (1965), and even the absence of a statement of basis and purpose is not fatal when the purpose is obvious. *Hoving Corp.* v. *FTC*, 290 F.2d 803, 807 (2d Cir. 1961). Since even eight years later TECA could readily discern the path followed by the agency and the rationale for its action, the court properly held that the statement was sufficient. Pet. App. A38-A39; accord, *Alabama Ass'n of Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 533 F.2d 224, 237 (5th Cir. 1976), amended on other grounds, 558 F.2d 729 (1977), cert. denied, 435 U.S. 904 (1978).[14]

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[14] This case is not at all simliar to *Motor Vehicle Manufacturers Ass'n of the United States, Inc.* v. *State Farm Mutual Automobile Ins. Co.*, No. 82-354 (June 24, 1983), or *International Ladies' Garment Workers' Union* v. *Donovan*, 722 F.2d 795 (D.C. Cir. 1983), upon which petitioners rely. In both cases, agency action taken after notice and comment was held to be arbitrary and capricious because the agencies had failed to provide any reasons whatsoever for certain aspects of the actions they had taken. As we have noted above, however, in this case it has always been abundantly clear, both to petitioners and to the reviewing courts, why the agency acted as it did in promulgating the deemed recovery rule.

3. As we have shown, TECA's decision is fully consistent with the requirements of the APA and does not raise any issue requiring this Court's review. It bears repeating, however, that this case involves a belated procedural challenge to regulations promulgated nearly 10 years ago under a program terminated more than three years ago. In this context, petitioners' concern (Pet. 7-8) that the decision below "will stand as an open invitation for agencies to ignore rulemaking procedures" lacks credence. TECA carefully limited its decision to the unique situation before it—belated review of a rulemaking that occurred during a time of extreme volatility in an industry vital to the national interest. As TECA recognized (Pet. App. A39), it is now time to lay this matter to rest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 83-1515

In the

Supreme Court of the United States

October Term, 1983

MOBIL OIL CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION and MARATHON PETROLEUM COMPANY,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and DONALD P. HODEL, SECRETARY OF ENERGY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

PETITIONERS' JOINT REPLY BRIEF

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NO. 83-1515

In the

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October Term, 1983

MOBIL OIL CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION and MARATHON PETROLEUM COMPANY,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and DONALD P. HODEL, SECRETARY OF ENERGY,

Respondents.

Petitioners[1] submit this joint brief in reply to the Brief for the Respondents in Opposition ("DOE Br."). Contrary to the impression respondents seek to create, the issues presented are hardly matters of passing academic interest. Rather, the decision below announced broad and novel interpretations of the Administrative Procedure Act ("APA") which the Temporary Emergency Court of Appeals ("TECA") itself recognized threatened to create an "all purpose escape-clause" from APA rulemaking. Pet. App. A-29. Those issues merit this Court's review, especially since billions of dollars may hang in the balance.

1. Pursuant to Rule 28.1, a listing of each petitioner's non- wholly-owned subsidiaries or affiliates is set forth in the Petition Appendix ("Pet. App.") at 119-140.

ARGUMENT

I. The Rule At Issue Was Not Mandated by Congress

DOE asserts that TECA's interpretation of the APA in this case was justifiable because the rule at issue was responsive to the agency's Congressional mandate.[2] It relies upon the views of eight members of the Senate Committee on Interior and Insular Affairs, DOE Br. 6-7, as support for its position that the deemed recovery rule was "required by the 'purpose and intent' of the EPAA." DOE Br. 7. *See* S. Rep. No. 26, 94th Cong., lst Sess. (1975). The Interior Committee's bill, however, was stricken entirely by the House of Representatives. Thus, the views of those Senators did not prevail in the Congress as a whole. *See* S. Conf. Rep. No. 516, 94th Cong., lst Sess. 116 *reprinted in* 1975 U.S. Code Cong. & Ad. News 1956, 1957. Majorities of the full House and Senate concluded that the market had largely returned to normal and that "a comprehensive regulatory structure. . . may no longer be necessary." *Id.* at 203, 1975 U.S. Code Cong. & Ad. News at 2045. Accordingly, Congress enacted the Energy Policy and Conservation Act ("EPCA") giving the President authority to propose the decontrol of petroleum product prices. *Id.* at 204, 1975 U.S. Code Cong. & Ad. News at 2045-46; Pub. L. No. 94-163, § 455, 89 Stat. 871, 950-952. Thus, the EPCA certainly cannot be described as a Congressional directive to continue any price control regulation.

Notwithstanding the assertions in its brief, the agency is well aware that the deemed recovery rule was not mandated by Congress in either the EPAA or the EPCA. Acting under authority granted by both of those Acts, DOE eventually revoked the rule, concluding that it ran counter to the statutory goals of the EPAA. *See* 45 Fed. Reg. 72626, 72628 (Nov. 3, 1980). Earlier, in the September 10, 1974 notice proposing to modify the rule, the

2. For example, the agency states that "Congress directed the agency to foreclose [discriminatory pricing] by appropriate regulations," DOE Br. 13, and that the purpose of the rule was "Congress's mandate that there be no price discrimination," *id.* at 19. *See also id.* at 16 n.13.

agency had noted that the rule "can have results that appear to be at odds with the objectives of the EPAA."39 Fed. Reg. 32717 (Sept. 10, 1974). Given these prior determinations, the suggestion that the rule did no more than follow a Congressional "mandate" is wholly inaccurate.

II. TECA's Novel Interpretation of the APA Good Cause Exception Merits Review

Petitioners have shown that by according "special deference" to the agency's assertion that public participation in a rulemaking would be contrary to the public interest, TECA effectively created the "all purpose escape-clause" which it feared. *See* Petition ("Pet.") 9-14. Respondents do not address this serious implication of the decision below and simply defend that ruling as following this Court's teachings regarding judicial deference to agency judgments. DOE Br. 14. This Court, however, has never held that an agency's decision to avoid public rulemaking is entitled to deference, much less the special deference which TECA accorded the agency here. The APA reflects Congress's judgment that the benefits of public rulemaking outweigh its costs. The contrary judgment of administrators should be subjected to strict judicial scrutiny, not accorded special deference.

Significantly, the agency has no response to petitioners' showing that, under TECA's decision, agencies can dispense with rulemaking simply by asserting that regulated parties will seek to avoid a proposed rule during a comment period. *See* Pet. 12. DOE's alleged fear of grandfathering — to which TECA deferred — was specious, since any rule promulgated after notice could easily have prevented such grandfathering. Pet. 14. Respondents do not discuss, much less dispute, that fact. Nonetheless, that unsupported speculation was afforded total deference by TECA. Similarly, respondents do not deny that there was a regulatory prohibition against the price discrimination which the agency feared would take place during a short notice period. *See* DOE Br. 16 n.13; *cf.* Pet. 13-14. Instead, DOE asserts that Congress directed the agency to guard against discriminatory pricing

"notwithstanding the existence of such general prohibitions."[3] As shown above, no such legislative directive existed, and TECA certainly never relied upon such a supposed mandate. Rather, TECA simply deferred to an agency conclusion for which there is no support.

Petitioners do not suggest, as respondents assert, that their "disagreement with TECA's assessment of the facts" warrants this Court's review. DOE Br. 16. Rather, petitioners have shown that TECA's holding that an agency decision to bypass rulemaking is entitled to special deference presents important questions which have not been decided by this Court. That the deference here was to the agency's unsupportable speculation merely highlights the danger inherent in TECA's approach.

III. TECA's Open Departure From the APA Warrants Review

Respondents do not deny that the APA requires an agency to incorporate a statement of good cause for dispensing with rulemaking in the rules issued. DOE Br. 12. Nor do they deny that TECA looked to the September 10 notice of proposed rulemaking to support the adequacy of the agency's September 5 good cause statement. DOE Br. 16 n.13. The agency claims that this search was justified since, as TECA concluded, the September 10 statement was not "made for litigation." *Id.* Whether an agency may rely upon statements manufactured for litigation is not at issue. The issue is whether the judiciary may engage in a roving quest

3. As support for this assertion, respondents cite to "page 4 note 5" of their brief. *See* DOE Br. 16 n.13. In the referenced note, however, the agency merely refers to several of the general objectives of the EPAA. DOE Br. 4 n.5. The DOE's general anti-discrimination regulation, however, was promulgated *after* passage of the EPAA. *See* 39 Fed. Reg. 5311 (Feb. 12, 1974). Thus, the EPAA was certainly not a direction to guard against discriminatory pricing "notwithstanding the existence" of a general prohibition promulgated after its passage. Moreover, as shown *supra*, neither the EPAA nor the EPCA directed the adoption or maintenance of the deemed recovery rule.

for any agency pronouncement which might qualify as a statement of good cause for dispensing with rulemaking notwithstanding the APA's explicit requirement to the contrary. DOE's Brief demonstrates the error of TECA's approach.

As DOE summarizes, "the September 10 notice merely discussed the pros and cons of the rule," DOE Br. 16 n.13, in the context of a proposed amendment to the rule. It did not purport to set forth any reasons for dispensing with public rulemaking when the rule was originally issued. Indeed, by cataloging the deleterious effects of the rule, the September 10 notice confirms that there was no good cause for the rule itself, much less good cause for denying the public its right to participate in the rule's adoption. Nevertheless, TECA selected certain agency pronouncements and declared that they constituted a good cause statement even though they did not even purport to be one. If TECA's decision is allowed to stand, agencies will have no incentive to set forth adequate good cause statements and other courts will be encouraged to search, after the fact, for some justification for agency action. That decision merits review by this Court.

IV. TECA's Elimination of the APA's Basis and Purpose Statement Warrants Review

As shown in the Petition, TECA's holding that the agency "repromulgated" the deemed recovery rule on December 5, 1974 was plain and inexplicable error. Pet. 17-21. On December 24, 1974, the agency stated that it had "not yet completed its analysis" of its September 10 proposal to modify the deemed recovery rule. 39 Fed. Reg. 44407 (Dec. 24, 1974). *See* Pet. 5, 21. Thus, the agency could hardly have intended to repromulgate the rule on December 5, 1974.

Respondents offer no alternative explanation of the DOE's December 24, 1974 statement. Instead, the agency, like TECA, simply ignores this recognition — this proof — that no repromulgation took place on December 5. DOE then persists in defending TECA's holding that the statement of basis and purpose required

by the APA may be non-existent where the agency's purpose is "evident."[4] DOE Br. 19.

The decision below adopts an interpretation of the APA which permits an agency to dispense with a statement of basis and purpose for its actions and subsequently argue that its aims were "evident."That decision erodes one of the specific APA requirements through which Congress sought to ensure reasoned agency decisionmaking.

V. The Substantial Consequences of the Decision Below Underscore the Need For Review by This Court

Respondents do not dispute petitioners' statement that DOE's ongoing enforcement proceedings allege in excess of one billion dollars in overcharges based on fictitious cost recoveries under the deemed recovery rule. Pet. 4. As respondents point out, two district courts have already relied upon TECA's decision in private overcharge suits. DOE Br. 11 n.10. Although the price control program terminated more than three years ago,[5] the agency can be expected to rely upon the decision below in all its rulemaking litigation and enforcement proceedings and private parties will undoubtedly do the same in their overcharge suits. Moreover,

4. As set forth in the Petition, TECA merely guessed, and guessed incorrectly, that the agency thought the rule was in the public interest. Pet. 19-21. Thus, while the September 10 notice "discussed the pros and cons of the rule," DOE Br. 16 n.13, the December 5 statement does not explain why the agency would have concluded that the adverse impact of the rule should be continued. Nor is there any indication that the agency had considered issues raised in the comments and still decided to repromulgate the rule. Indeed, there is no explanation why the agency did not conclude that the rule was contrary to the public interest, as it subsequently concluded when revoking the rule in 1980. 45 Fed. Reg. 72626, 72628 (Nov. 3, 1980). In short, the agency never explained the basis and purpose for its alleged December 5 promulgation; TECA merely incorrectly speculated as to DOE's rationale.

5. Respondents suggest that petitioners' challenge to the deemed recovery rule was "belated" since it was brought in January 1979, slightly more than four years after the rule was promulgated. DOE Br. 2, 7, 21. As the district court recognized, however, petitioner Mobil brought this action promptly after it had reason to believe that it was potentially adversely affected by the rule in light of the agency's interpretation of another rule. Pet. App. A-82. *See id.* at A-74-A-82. Indeed, DOE itself did not formally allege that petitioner Mobil had probably violated the rule until almost one year after Mobil brought this action. Office of Special Counsel, Department of Energy, Case No. RMOB00001 (Notice of Probable Violation issued December 12, 1979).

TECA's decision announces broad principles which apply in any APA context. Thus, those issues and the decision below are not of "purely academic interest." DOE Br. 12.

Congress subjected the DOE to the same APA requirements as other administrative agencies and permitted regulated parties in the energy industry to enforce those procedural safeguards. Similarly, although TECA is a specialized court, Congress provided that TECA's decisions were reviewable by this Court in appropriate cases. This is just such a case, since TECA's novel application of the APA threatens to create an "all purpose escape-clause" which may be relied upon by DOE or any other agency.

CONCLUSION

For the reasons set forth above and the additional reasons stated in the Petition, petitioners urge that a writ of certiorari issue to review the decision of the Temporary Emergency Court of Appeals.

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